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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

NOS. 854 AND 864

A. L. A. SCHECHTER POULTRY CORPORATION, SCHECHTER LIVE POULTRY MARKET, JOSEPH SCHECHTER, MARTIN SCHECHTER, ALEX SCHECHTER, and AARON SCHECHTER, Petitioners

v.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, Petitioners

v.

A. L. A. SCHECHTER POULTRY CORPORATION, MARTIN SCHECHTER, ALEX SCHECHTER and AARON SCHECHTER

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONERS IN No. 854 AND FOR RESPONDENTS IN No. 864

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS IN No. 854 AND FOR RESPONDENTS IN No. 864

THE OPINIONS OF THE COURT BELOW

The opinions of the Circuit Court of Appeals are not yet reported. Its opinion upon the hours and wages counts appears at R. 1060-1063. The opinion of that court upon the remaining counts is at R. 1048-1060. The opinion of the District Court upon demurrer is at R. 131-164.

STATEMENT

1. The business in which the defendants are engaged and its relation and that of the industry of which it is a part to interstate commerce.

Defendants[1] Schechter Live Poultry Market, Inc. and A. L. A. Schechter Poultry Corporation are corporations

[1]Since this case is here on cross petitions for certiorari, the parties throughout this brief will be described as "the Government" and the "defendants".

engaged in the City of New York in the slaughter and sale of poultry for the local New York market (R. 1351, 1423). The major part of the poultry so slaughtered and sold comes from outside the state and is bought by the defendants for slaughter and resale from the persons to whom consigned after its arrival in New York and delivery to the latter (R. 1411, 1413, 1073). After such purchase such poultry is transported or caused to be transported by the defendants to their respective slaughter houses or places of business in Brooklyn and commingled with other poultry of the defendants for slaughter and resale (R. 1368, 1419, 1920). Such transportation from the place of delivery of the articles purchased in interstate commerce is conducted wholly within the State[2] and the slaughtering and resale of the poultry so purchased is conducted wholly within the state. Defendants do not sell poultry in interstate commerce, and are not charged with doing so (R. 50, 51, 63, 65, 66, 72, 75, 76-82). The business of the corporate defendants is, therefore, a local business conducted wholly within the State of New York, both in respect of their manufacturing operations and their sales, although the articles there manufactured (slaughtered) and sold have, for the most part, moved into the State in interstate commerce. The Schechter Live Poultry Market, Inc. was operated by the individual defendant Joseph

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[2]It appears that during the times covered by the indictment the defendants also caused to be brought into New York two truckloads of poultry most of which was bought as an accommodation purchase for another slaughterer (R. 1396) and carried direct to the defendants' places of business which after delivery thereat, were slaughtered and resold to the local trade. Otherwise, all of the poultry slaughtered by the defendants came into New York consigned to persons other than the defendants and was purchased by the defendants from them, and such is the normal course of the defendants' business (R. 1411).

Schechter (R. 1423) and the A. L. A. Schechter Poultry Corporation was operated by the individual defendants Alexander, Martin and Aaron Schechter (R. 1351). Joseph Schechter did not participate in the management of this concern but guaranteed its credits (R. 1423-1424).

As slaughterers of poultry for sale in the local New York market defendants are members of the live poultry industry. The Code, for the violation of whose provisions defendants were convicted, but to which they never assented, is a Code covering the "Live Poultry Industry of the Metropolitan Area in and about the City of New York." The term Metropolitan area (Code, Article II, Section 24, R. 19) includes the five boroughs of the City of New York, four adjoining counties in New York, two adjoining counties in New Jersey and one adjoining county in Connecticut. It covers all persons engaged in the business of trading in or slaughtering live poultry "from the time such poultry comes into the New York metropolitan area until the time it is first sold in the slaughtered form" (Code, Article I, Section 1, R. 16). Every sale of chickens charged to the defendants in the indictment, and alluded to in the record, was a sale to a retailer whose store is located in Brooklyn, New York (R. 50, 51, 63, 65, 66, 72, 75-82). There is no evidence that any of the slaughter houses conducting their business within the city of New York sell poultry in interstate commerce, although the evidence is that by far the greater part of the poultry purchased by them comes into New York from outside the State. It does not appear whether members of the industry in the adjoining counties in New Jersey and Connecticut slaughter for sale in their local market or in interstate commerce as well, but since the defendants' business is conducted wholly within the city it is immaterial whether those

members of the industry in the Metropolitan area outside of the State of New York slaughter for sale in interstate commerce or not. The Government makes much of the fact that the New York market is the largest poultry market in the United States. This is to be expected, since New York is the largest city in the United States. It is said that the prices paid in New York affect the prices paid elsewhere and at points of origin. This may be so, but, if so, it is a condition that exists in respect of every industry by reason of the interplay of prices in various consuming markets upon prices at other consuming markets and at points of origin.

As appears from the foregoing, all of the poultry slaughtered for resale by the defendants and others engaged in a similar line of business had ceased to be articles of interstate commerce and had come to rest and had become commingled in the general mass of goods in the State at the time of such slaughter and sale. There is entirely lacking that flow of interstate commerce through the city of New York whose movement is but temporarily arrested there, the supposed existence of which the argument of the Government assumes. Moreover, as appears from the foregoing, the form of the articles of interstate commerce which come into New York is transformed by the operations of the defendants and others similarly engaged from a raw product (live poultry) to a manufactured product (slaughtered poultry) for local consumption and use in its transformed state.

2. The result of the trial in the District Court.

The defendants were indicted on 59 counts (R. 62-119) charging various violations of the Live Poultry Code

as set forth in the indictment (R. 3-43)[2] and on one count (R. 2-62) (within which count is included the code and executive action taken thereon by the President) charging the defendants with a criminal conspiracy to commit such violations.

A demurrer having been sustained to 27 of the 60 counts (R. 130), defendants were tried on the remaining 33 counts. On 14 of these counts they were acquitted and on 19 convicted (R. 1648).

3. The counts (alleged violation of code provisions regulating wages and hours in slaughter houses) on which the Circuit Court of Appeals set aside the conviction and the basis of its decision thereon.

The Circuit Court of Appeals set aside the conviction on two counts and affirmed the conviction on seventeen. The counts on which conviction was set aside were:

Two counts charging violation of the minimum wage and maximum hour privisions, one (Count 46, R. 101-102) charging defendants with paying wages amounting to less than 50c per hour "to a person employed by them in the wholesale slaughter house operated by them" and one (Count 55, R. 111-112), charging defendants with causing and permitting "a person employed at the wholsale slaughterhouse operated by them * * * to work at the said

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[2]The Code, set forth in full in the Appendix (p. 12) is entitled "CODE OF FAIR COMPETITION for the LIVE POULTRY INDUSTRY of the METROPOLITAN AREA IN AND ABOUT THE CITY OF NEW YORK." The Code thus, on its face, purports to regulate primarily a business conducted wholly within the City of New York and the area adjacent thereto.

slaughterhouse in excess of 60 hours per week" in violation of the Code.[4]

The employee to whom this charge relates was employed at the wholesale slaughterhouse of the defendants as a book keeper and general handyman performing various functions, none of which was charged in the indictment or shown by the proof to be performed in interstate commerce[5] (R. 1013, 1309, 1331-1335, 1340, 1341). The Circuit Court of Appeals set aside the conviction on these counts upon the ground that the wage and hour provisions of the Code governing slaughterhouse employees were void because not within the power conferred by the Commerce Clause (R. 1662-1663). Judge Manton dissented (R. 1660).

4. The counts on which convictions were sustained by the Circuit Court of Appeals—the record on which the verdict rests and the relation of the charges contained in such counts to interstate commerce.

The counts on which convictions were sustained were:

(A) STRAIGHT KILLING—WHAT IT IS AND ITS RELATION TO INTERSTATE COMMERCE.

Ten counts (Counts 24-33, R. 71-82) charging that the defendants permitted their customers to make "selections

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[4]The Code fixed a maximum of 48 hours in any one week for slaughter house employees (Article III, R. 19) and a minimum wage of 50c per hour (Article IV, R. 20).

[5]Defendants were acquitted on four other counts charging violation of the minimum wage provisions of the Code (Counts 47-50, R. 102-106) and on eight other counts charging violations of the maximum hour provisions (Counts 51-54, R. 107-111 and Counts 56-59, R. 113-117).

of individual chickens taken from particular coops and half coops" for slaughter and sale to them (see Count 24, R. 72 as typical) and in violation of the code provision prohibiting any method of slaughter and sale except that referred to therein as "straight killing".[6]

In plain English, the straight killing provision of the Code forbids the slaughterer's customer from selecting either out of a particular coop of poultry, or from all of the poultry in the possession of the slaughterer, those chickens which he desires to buy; requires him to buy either in full coops or in half coops; if the former to take all of the chickens in the coop (excluding culls) and if a half coop to take that half of the chickens in the coop which are first taken out of it at random (excluding culls). "Coop run," so to speak.

This result is accomplished by prohibiting "the use in the wholesale slaughtering of poultry, of any method of slaughtering other than straight killing." This is in terms a regulation of the conduct of manufacture, the effect and purpose of which is to prevent the customer from selecting that which he chooses to buy and from paying for the same according to the quality of what he purchases. If this is not made plain from the language of the Code provision itself, it is made plain by the evidence relied on by the Government itself, to support the charge, and will not be denied.

[6] The governing provision of the Code is as follows (R. 37):

"Sec. 14. *Straight killing.* The use, in the wholesale slaughtering of poultry, of any method of slaughtering other than 'straight killing' or killing on the basis of official grade. Purchasers may, however, make selection of a half coop, coop, or coops, but shall not have the right to make any selection of particular birds."

(B) AVOIDANCE OF INSPECTION.

Two counts (Counts 4 and 5, R. 66-71) charged the defendants with "selling" poultry "without having the same inspected or approved in accordance with any rule, regulation or ordinance of the City of New York, in violation of Article VII, Section 22, of said Code" (Count 4, R. 66, Count 5, R. 68).[7]

The evidence on which this charge rests is that a portion of certain poultry trucked in by the defendants from outside the State was sold without inspection. The uncontradicted evidence shows that most of the poultry which was not inspected (including all of the poultry referred to in Count 4) represented poultry brought in as a matter of accommodation for another slaughterer and sold by him (R. 1396). The Code provision forbids sale without conforming to local inspection laws. It should also be observed that the poultry had come to rest within the State before sold and that the Code provision relied on as a regulation of *interstate commerce* is a provision forbidding the local "sale of poultry" unless inspected in accordance with *"local state regulations and ordinances"*, and not a provision requiring the observance of Federal inspection regulations expressly imposed by a Federal statute in the exercise of the commerce power.

(C) SALE OF UNFIT POULTRY.

One count (Count 2, R. 62) charged the sale of one chicken alleged to be unfit for human consumption in violation of Article VII, Section 2 of the Code.[8]

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[7]Article VII, Section 22, on which these counts rest, forbids the sale of live poultry which has not been inspected and approved in accordance with the rules, regulations, and/or ordinances of the particular area (R. 39).

[8]This section provides that members of the Industry shall not "Knowingly purchase or sell for human consumption culls or other produce that is unfit for that purpose" (R 34).

The prohibition is against "knowingly" selling unfit poultry. The defendants were charged (Count 3, R. 65-66) with selling two other unfit chickens on which they were acquitted. The three chickens, which are the subject of these two counts, had been passed as fit by the Federal inspector (R. 955). Thereafter, an agent of the Code Authority, sent to the defendants' place of business to procure evidence upon which to base a criminal charge, surreptitiously marked these three chickens for identification and followed them into the hands of their purchaser. A Board of Health officer was called to look at them and found it necessary to perform an autopsy on them for the purpose of determining whether they were fit or not (R. 710). The autopsy disclosed that the two chickens, covered by the count on which defendants were acquitted, were altogether fit but that the third chicken, covered by the count on which they were convicted, was "egg-bound" (R. 710). There is no evidence that the defendants ever saw or that their attention was ever called to these three chickens after they had been passed as fit by the Federal inspector. The conviction rests upon the results of the autopsy, not on conclusions either to be drawn from the outward appearance of the chickens, or from any knowledge brought home to the defendants that these chickens previously passed by the Federal inspector as fit were even suspected of being unfit.[9] The one chicken covered by the count on which the conviction rests had ceased to be an article of interstate commerce at the time of its sale and the Code provision was one purporting to regulate the sale of slaughtered poultry within the State of New York after it had ceased to be such an article.

[9]It is also the contention of the defendants that there was a failure of proof on other counts on which they were convicted.

(D) The Making of False Reports, or Failure to Report.

One count (Count 38; R. 90), charged the making of reports containing "false and fictitious statements" relating to the range of daily prices and volumes of sales for the period between May 19 and June 11, 1934 (Count 38, R. 91) and another (Count 39, R. 92) charged failure to submit any reports "relating to the range of daily prices and volumes of sales between June 11, 1934, and the return of the indictment", in violation (Count 38) of Article VI, Sections 1 and 2, and Article VIII, Section of the Code, and (Count 39) in violation of Article VIII, Section 3 of the Code.[10]

This code provision, imposed by federal authority, is one requiring reports of sales and range of prices received in the sale of slaughtered poultry within the State of New York after such poultry has ceased to be an article of interstate commerce. This provision constitutes the attempted exercise of visitorial powers by Federal authority upon persons not engaged in interstate commerce.

The evidence relied upon for conviction under the count charging false reports, fails to take into account accommo-

[10]Article VI, Sections 1 and 2, provide for the appointment of a Code Supervisor (Section 1, R. 25) and an Industry Advisory Committee (Section 2, R. 27-29); delegate to the Supervisor the duty to administer the Code, to prescribe rules and regulations for its administration and to submit reports to the Secretary or Administrator upon request with reference to the operation and effect of the Code (R. 26-27), make it the duty of the Advisory Committee to cooperate with the Code Supervisor in the administration of the Code and to act as a planning and research agency for the industry for the purpose of making recommendations (R. 32). Article VIII, Section 3, reads as follows (R. 42):

> *"Listing sales prices.*—Every member of the industry shall submit a weekly report to the code supervisor. Such report shall show the range of daily prices and volume of sales for each kind, grade, or quality of produce sold by the member of the industry during the reported week.".

dation sales (R. 1061) (sales made by the defendants for the account of others and reported by such others) and is apparently based upon the theory that the Act required the defendants to report sales other than their own. Within the period covered by the other count defendants did not make reports. It is the contention of the defendants (1) that, since this provision of the Code may not be supported as an exercise of federal authority under the commerce clause, they were not required to make such reports (this applies as well to the charge of making false reports) and (2) that since they had been advised at this time of the purpose of the Code authority, or the Government, to bring a criminal prosecution against them they could not be compelled to furnish evidence against themselves (see Part II, Point IX).

(E) Selling to Unlicensed Slaughterers or Dealers.

One count (Count 60, R. 117-118) charged defendant A. L. A. Schechter Poultry Corporation and defendants Martin, Alex and Aaron Schechter with selling to Joseph Schechter, or to the Schechter Live Poultry Market, Inc. in violation of the ordinances of the City of New York requiring the licensing of slaughterers of poultry and of the regulations of the Board of Health of said City. This was made a violation of the Code by Article VIII, Section 15[11] thereof, which prohibited the sale of poultry within the City of New York to an unlicensed slaughterer or dealer in violation of local ordinances and regulations. It appears that the place of business conducted by the defendants

[11] This section prohibits "The sale or resale of produce to any person not legally entitled to conduct a business of handling the produce of the industry (where a license or permit is required)" (R. 37).

Joseph Schechter or Schechter Live Poultry Market was licensed (R. 596, 1432).

5. The Conspiracy Count.

The Circuit Court of Appeals also affirmed the conviction on Count 1 (R. 2-62) charging defendants with a criminal conspiracy to commit, among others, the offenses charged in the counts hereinbefore reviewed. The Recovery Act (Sec. 3 (*f*)) makes any violation of any provision of a code "in any transaction in or affecting interstate or foreign commerce" a misdemeanor, subjecting the offender to a fine of not more than $500 for each offense and providing that each day such violation continues shall be deemed a separate offense. It imposes no jail sentence. The object of the conspiracy charge was, of course, to lay a foundation upon conviction for a jail sentence, which upon conviction was imposed upon the individual defendants. It is the contention of the defendants; (1) that for each and all of the reasons to be hereinafter set forth the code provisions on which the substantive counts rest were beyond the authority of the United States to make, or to impose upon these defendants and that hence there could be no criminal conspiracy to commit acts in themselves not unlawful; (2) that there was a complete failure of proof on the conspiracy charge (Part II, Point X); and (3) that if a single one of the code provisions, of whose violation defendants were convicted, was void because beyond the constitutional power of Congress to make or enforce (the Circuit Court of Appeals so held in respect of the wage and hour provisions), as a result of which conviction on the count predicated on such provision must be set aside, or if conviction on any other of the substantive counts is set aside for any other reason, the conspiracy charge falls with the setting aside of the conviction on such count (Part II, Point X).

THE STATUTES INVOLVED

The statutes involved are the National Industrial Recovery Act, reproduced in an Appendix printed under separate cover (pp. 1-11) and the act defining criminal conspiracy and imposing penalties and punishment therefor, reproduced in the Appendix (p. 45).

The National Industrial Recovery Act purports to give all the force and effect of statutes to the Codes promulgated thereunder, making a violation thereof a misdemeanor. The CODE OF FAIR COMPETITION for the LIVE POULTRY INDUSTRY of the METROPOLITAN AREA IN AND ABOUT THE CITY OF NEW YORK, for the violations of whose provisions (R. 3-43) defendants were convicted, is set forth in full in the Appendix (pp. 12-34).

SPECIFICATION OF ERRORS

1. The courts below erred in failing to hold that the National Industrial Recovery Act, and all parts thereof, including Sections 3 and 7, is void because constituting an unconstitutional delegation of legislative power, in so far as it purports to confer upon the President the authority to adopt and make effective codes of fair competition and to prescribe maximum hours of labor and minimum rates of pay.

2. The courts below erred in failing to hold that the Code of Fair Competition for the Live Poultry Industry, and the several provisions thereof upon which conviction was had in this case, are, jointly and severally, void as constituting the result of an exercise of legislative power unconstitutionally delegated.

3. The District Court erred in failing to hold that the minimum wage and maximum hour provisions of the Code of Fair Competition for the Live Poultry Industry, as applied to these defendants and their employees, are void because beyond the scope of the constitutional authority of the Federal Government and violative of the Tenth Amendment to the Constitution of the United States, and because they deprive these defendants of their liberty and property in violation of the Fifth Amendment thereto.

4. The courts below erred in failing to hold that the "straight killing" provision of the Code of Fair Competition for the Live Poultry Industry is void because not constituting either a regulation of interstate commerce or a regulation sustainable under any definition of fair competition, and because it deprives these defendants of their liberty and property in violation of the Fifth Amendment.

5. The courts below erred in failing to hold that the provisions of the Code of Fair Competition for the Live Poultry Industry relating to the sale of unfit poultry, requiring the inspection of poultry, restricting the sale thereof to those licensed in accordance with local laws, and requiring the filing of reports with the Code Supervisor, are void, as here applied, because not constituting regulations of interstate commerce, and because they deprive the defendants of their liberty and property in violation of the Fifth Amendment.

6. The courts below erred in failing to hold that the several provisions of the Code of Fair Competition for the Live Poultry Industry are void because not constituting regulations of interstate commerce.

7. The courts below erred in failing to hold that the penal provision of the National Industrial Recovery Act is void and unconstitutional for indefiniteness and vagueness.

8. The Circuit Court of Appeals erred in failing to hold that the reversal of conviction upon the wage and hours

counts also required a reversal of the judgment upon the conspiracy count.

9. The courts below erred in failing to hold that counts 4, 5, 38 and 60 of the indictment were fatally defective and demurrable for failure to plead the substance of the applicable ordinances, municipal regulations and rules.

10. The Circuit Court of Appeals erred in failing to hold that the reversal of the judgment of conviction upon the wage and hour counts required the reversal of the judgment upon all the counts on the ground that the whole Code must fall if any provision thereof is unconstitutional or unauthorized.

11. The District Court erred in refusing to direct a verdict for the defendants on counts 1, 2, 4, 5, 24 to 33 inclusive, 38, 39 and 60.

12. The Circuit Court of Appeals erred in affirming that part of the judgment of the District Court relating to counts 1, 2, 4, 5, 24 to 33 inclusive, 38, 39 and 60 of the indictment.

13. The Circuit Court of Appeals erred in failing to hold that the charge of the District Court with respect to the effect of the acts of defendants upon interstate commerce, was reversible error.

14. The Circuit Court of Appeals erred in failing to hold that the acceptance by the District Court of the jury's verdict of guilty upon the conspiracy count, and the actions of said District Court with respect to said verdict, constituted reversible error.

15. The Circuit Court of Appeals erred in failing to hold that the District Court in refusing to accept evidence from the defendants as to the arbitrary, unreasonable and capricious nature of the "straight killing" regulation in the Code, was reversible error.

ARGUMENT

PART I

THE CONSTITUTIONAL QUESTIONS INVOLVED

SUBDIVISION I OF PART I—DELEGATION OF LEGISLATIVE POWER

I

THE NATIONAL INDUSTRIAL RECOVERY ACT, IN SO FAR AS IT PURPORTS TO CONFER UPON THE PRESIDENT THE AUTHORITY TO ADOPT AND MAKE EFFECTIVE CODES OF FAIR COMPETITION AND IMPOSE THE SAME UPON MEMBERS OF EACH INDUSTRY FOR WHICH SUCH A CODE IS APPROVED, IS VOID BECAUSE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER.

1. Synopsis of the Provisions of the Act.

The National Industrial Recovery Act is entitled "An Act to Encourage National Industrial Recovery, to Foster Fair Competition, and to Provide for the Construction of Certain Useful Public Works, and for Other Purposes." Title I of the Act is entitled "Industrial Recovery". It is this title with which we are solely concerned.

Section 1 is entitled "Declaration of Policy". It is set down in the Act all in one paragraph, but for the sake of clarity and to emphasize its multifariousness we are indenting the various clauses. Section 1 reads as follows:

"It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof;

"and to provide for the general welfare

"by promoting the organization of industry for the purpose of cooperative action among trade groups,

"to induce and maintain united action of labor and management under adequate governmental sanctions and supervision,

"to eliminate unfair competitive practices,

"to promote the fullest possible utilization of the present productive capacity of industries,

"to avoid undue restriction of production (except as may be temporarily required),

"to increase the consumption of industrial and agricultural products by increasing purchasing power,

"to reduce and relieve unemployment,

"to improve standards of labor,

"and otherwise to rehabilitate industry

"and to conserve natural resources."

In Section 2 of the Act the President of the United States is authorized to effectuate the policy of Title I by establishing such agencies and appointing such officers and employees as he sees fit. He is further authorized to delegate any or all of his functions and powers under Title I to such officers, agents, employees and agencies.

Section 3 of the Act provides for the enactment of so-called "codes of fair competition". It was pursuant to this section that the President approved the Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York (Appendix, p. 12). Trade or industrial associations or groups "representative" of trades or industries or branches thereof may formulate "codes of fair competition" and present them to the President for approval. Sec. 3 (a). When approved by the President the provisions of each "code of fair competition" are to be the standards of fair competition for the entire trade or industry or branch thereof in question and compulsory upon all non-assenters as well as proponents. Sec. 3 (b).

The President may "as a condition of his approval of any such code" impose in his absolute discretion any conditions he deems to be "in furtherance of the public interest" for the protection of consumers, competitors, employees and others. He may also provide such exceptions to and exemptions from the provisions of the code as in his absolute discretion he deems necessary to effect the policy "herein declared." Sec. 3 (a). Any violation of any provision of a code in any transaction "in or affecting interstate or foreign commerce" is declared an "unfair method of competition" in commerce within the meaning of the Federal Trade Commission Act. Sec. 3 (b). The several District Courts of the United States are invested with jurisdiction to prevent and restrain code violations, and the United States attorneys in their respective districts are authorized to institute such injunctive proceedings. Sec. 3 (c).

In the event no code is presented to the President by the members of a trade or industry he may prescribe a code which shall bind the entire industry. Sec. 3 (d).

When a "code of fair competition" has been approved or prescribed by the President, any violation of any provision thereof in any transaction "in or affecting interstate or foreign commerce" is made a misdemeanor punishable by a fine of $500, each day the violation continues to be deemed a separate offense. Sec. 3 (f). It was under this subsection that defendants were convicted.

The Act provides for certain limitations with respect to what the nature and character of the codes *must not be*. Sec. 3 (a). It also provides for certain general labor provisions that they must contain. Sec. 7 (a). Otherwise the President's uncontrolled conception of what is "fair competition" prevails.

Section 3 (a) provides that the President may approve a "code of fair competition" provided he finds (1) that the trade or industrial association applying for the code imposes no inequitable restrictions on admission to membership and is "truly representative" of the industry; (2) that the code is not designed to and will not promote monopoly or monopolistic practices; (3) that the code is not designed to eliminate, oppress or discriminate against small enterprises; (4) that it will tend to effectuate the policy of Title I. The first requirement is merely a matter of procedure having to do solely with the "representative" character of the trade or industrial association presenting the code. The second and third requirements do not concern themselves at all with what provisions a "code of fair competition" shall or may contain. They merely outlaw and forbid "codes of fair competition" promotive of monopoly or oppressive to small business.

The second type of limitations upon code provisions is set out in Section 7 (a). There are certain labor provisions which every code must contain: first, the collective

bargaining and so-called anti "yellow-dog" contract provisions of Section 7 (a) (1) and (2), and second, the provisions of Section 7 (a) (3) that employers shall comply with the "maximum hours of labor", "minimum rates of pay", and other conditions of employment approved or prescribed by the President. Presidential action with respect to these latter matters is purely permissive, even if he has approved or prescribed a "code of fair competition."

The scheme for the fixing of "maximum hours of labor", "minimum rates of pay" and "other conditions of employment" is outlined in Section 7 (b) and (c). The President is required so far as practicable to afford every opportunity to employers and employees in any trade or industry, wherein collective bargaining obtains, to establish by mutual agreement the standards as to "maximum hours of labor" and "minimum rates of pay", and other "necessary" conditions of employment. When and if such agreements are made, the President *may* approve them. These agreements will then be the standards which all employers in the industry must comply with in accordance with Section 7 (a) (3).

Where no mutual agreement has been reached by collective bargaining in an industry, the President *may* conduct an investigation as to labor practices, policies, wages, hours of labor and other conditions of employment in the trade or industry, and he is authorized to prescribe on the basis thereof "maximum hours of labor" and "minimum rates of pay" and other conditions of employment in the trade or industry such as "will effectuate the policy of Title I." The President *may* (but does not have to) differentiate according to skill or experience of employees affected and according to the locality of employment.

Sec. 7 (c). As we have said before, he need not act at all with respect to wages and hours.

Under Section 10 the President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of Title I, and any violation of any such rule and regulation is to be punishable by fine or imprisonment. The President may cancel or modify any order, approval, rule or regulation issued under Title I.

2. The Live Poultry Code.

The Recovery Act does not itself set forth any acts which are punishable under Section 3 (f) thereof. It is left entirely to the "code of fair competition," which may or may not be approved or prescribed for an industry, to declare those acts which are to be criminal. Although the Act became effective June 16, 1933, the Live Poultry Code was not approved by the President until nearly a year later, April 13, 1934, and became effective April 23, 1934.

The Live Poultry Code contained the provisions required by Section 7 (a) of the statute and it prohibited, among other things: (1) the working of employees more than 40 hours a week, with certain exceptions (Article III); (2) the paying of wages less than 50 cents an hour (Article IV); (3) the employment of fewer persons than the number prescribed for various volumes of business (Article V, Section 9); (4) the following "unfair methods of competition"—(a) false advertising, (b) knowingly purchasing or selling produce unfit for human consumption, (c) discrimination between customers by rebates, etc., (d) commercial bribery, (e) interference with contractual relations, (f) defamation of creditors or customers, (g)

"destructive" price cutting, all selling below market price being deemed *prima facie* such, (h) price discrimination between purchasers, (i) giving of prizes and premiums, (j) misrepresentation respecting produce, (k) excessive feeding to increase sale weight, (l) false weighing, (m) delay of unloading to cause shrinkage of weight, (n) "selective" killing, (o) sales to unlicensed persons, (p) misrepresentations as to expected shipments to create false market, (q) misrepresentation of facts affecting price, (r) combinations to monopolize or restrain trade, (s) unreasonable service charges, (t) misrepresentation as to function or business, (u) "racketeering" (Article VII).

3. The Formulation and Promulgation of the Live Poultry Code of Fair Competition was Essentially a Legislative Act.

That Congress has delegated to the President the power to make laws in approving or prescribing codes of fair competition is rather plainly demonstrated from the foregoing recitals of what is contained in the Live Poultry Code.

A "code" has been defined as a "system of laws; any systematic body of law, especially one giving statutory force; a compilation of laws of public authority" (Webster's New International Dictionary). See also *Johnson* v. *Harrison*, 47 Minn. 575, 578, in which Judge Mitchell says that the word "code" as now generally used means a "system of law." Such "codes" are well known on the Continent of Europe, in Latin America and also in the United States, *i.e.*, Code of Napoleon, etc.

The idea of a "code" involves the exercise of the legislative power in its promulgation (Bouvier's Law Dictionary,

Vol. 1).[1] It may be described as a collection of pre-existing laws arranged and classified into a logical system or one intended to be such. By way of illustration, we have the Codes of Civil Procedure, Code of Criminal Procedure and the United States Code.

A "rule" on the other hand, has been defined as a principle or regulation set up by authority prescribing or directing action or forebearance as for instance a regulation made by a Court of Justice, or public office with reference to the conduct of business thegein (Black's Law Dictionary, 3d ed.).

The word "code" must have been advisedly used with knowledge of its usual sense as above defined. That there was no intention on the part of Congress to use the word "code" in lieu of the words "rules or regulations", witness Section 10 (a) of the National Industrial Recovery Act, which says that the President may prescribe "rules" and "regulations" to carry out the purposes of Title I.

In *Gibson Auto Co, Inc.* v. *Finnegan, Attorney General, et al.*, (March 5, 1935) 259 N. W. 420, the Supreme Court of Wisconsin held the Wisconsin Industrial Recovery Act unconstitutional as a delegation of legislative authority. This important case is hereinafter discussed more fully. Chief Justice Rosenberry, at page 423, said of such a code of fair competition:

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[1] In the draft of its brief the Government has admitted this, saying: "The approval of codes of fair competition establishing general rules applicable to an entire industry would *clearly appear to be legislative in character.*" Both parties to this case are petitioners in this Court. Since the text of this brief was written, preliminary drafts of the briefs of the Government and defendants have been exchanged for the purpose of acquainting each with the general scope of the other's arguments and contentions.

> "* * * If the regulation of any trade or industry so minutely as is provided for by the code of fair competition of the motor vehicle retailing trade is in the public interest, the act nowhere so declares nor can it be said to be implied. What is in the public interest is to be found by the preponderant majority of the trade. The code as adopted and approved deals with matters of the highest public concern; co-operation between employees and employers, the elimination of unfair competitive practices; the reduction and relief of unemployment; the improvement of standards of labor, removal of obstacles to business recovery, the rehabilitation and conservation of the natural resources of the state. These matters of the very highest importance to the general welfare are by chapter 110 to be dealt with not by the legislature in whom the power to make laws is vested by the Constitution but by an indefinite unascertained self-perpetuating group which may be in existence or may thereafter come into existence."

Our situation does not differ except that the rubber stamp of the President must be placed upon the code of fair competition.[2] The President, however, has no more power to make laws than administrative bodies have. It is, therefore, plain from the essential nature of the Code itself and the manner of its enactment that the formulation and promulgation of the Code of Fair Competition for the Live Poultry Industry involved a complete abdication of the legislative power by Congress.

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[2]See discussion *infra* on "The Scope of the Recovery Act as Evidenced by the Codes Enacted Thereunder."

4. The Doctrine of the Non-delegability of Legislative Power.

Article I, Section 1, of the Constitution of the United States provides that

> "All legislative powers shall be vested in the Congress of the United States which shall consist of a Senate and House of Representatives."

It is well settled that this impliedly forbids the delegation of legislative powers by Congress to the executive or administrative bodies. In the recent case of *O'Donoghue* v. *United States*, 289 U. S. 516, 530, this Court said:

> "The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer* v. *Government of Philippine Islands*, 277 U. S. 189, 201, namely, to preclude a commingling of these essentially different powers of government in the same hands. And this object is none the less apparent and controlling because there is to be found in the Constitution an occasional specific provision conferring upon a given department certain functions, which, by their nature, would otherwise fall within the general scope of the powers of another. Such exceptions serve rather to emphasize the generally inviolate character of the plan."

By the Recovery Act Congress has delegated to the President of the United States the power to approve so-called codes of fair competition which may be presented to

him by "representative" trade or industrial associations. When and if such codes of fair competition are approved by the President each and every provision thereof has the full force and effect of law and violations thereof are constituted crimes. It is our contention that such a delegation of power is purely and simply a delegation of legislative power to the President of the United States on account of the fact that Congress has set up no intelligible policies to govern the President, no standards to guide and restrict the President in his action, and no procedure for making determinations in conformity with due process of law.

5. The Rules laid down by the Cases for determining whether Legislative Power has been Delegated.

Prior to the recent decision of this Court in the so-called *Oil* cases, *Panama Refining Co.* v. *Ryan et al.*, *Amazon Petroleum Corporation* v. *Ryan et al.*, 293 U. S. 388, this Court has not infrequently had occasion to pass on alleged delegations of legislative power by Congress to the Chief Executive or administrative bodies. The Government cites many of these cases as supporting its contention that the Recovery Act does not constitute an invalid delegation of legislative power. We believe, however, that there is no great difficulty in distinguishing all of these cases, and that they can be readily classified into definite categories, into none of which can that Act possibly be fitted. When Congress has prescribed (1) a reasonably intelligible policy; (2) a reasonably definite standard for administrative action in carrying out that policy, and (3) an administrative procedure complying with the requirements of due process of law, administrative action in accordance therewith does not involve any unconstitutional exercise of legislative power.

Such permissible administrative action is of two kinds: (a) when the policy which has been laid down by Congress is not to be effective at once or under all conditions and circumstances, a determination in accordance with the standard laid down by Congress as to when the conditions or circumstances have come into existence which Congress has said shall make the law operative, and (b) the carrying out of the policy of Congress by filling in details or making subordinate rules and regulations in accordance with the standard laid down by Congress.

Examples of the first class of cases are to be seen in *Field* v. *Clark*, 143 U. S. 649 (power to suspend operation of free list of imports in the event the President finds discrimination against American products by foreign nations); *Hampton & Co. v. United States*, 276 U. S. 394 (power in the President to adjust tariffs as relations between costs of production here and abroad change).

Examples of the second class are *Buttfield* v. *Stranahan*, 192 U. S. 470 (classification of foreign teas as to whether or not inferior); *Union Bridge Co.* v. *United States*, 204 U. S. 364 (classification of bridges as to whether obstructive of navigation by reason of height or width of span or other specified conditions); *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77 (quantity of food or drug contained in a package required to be marked thereon, and reasonable variations to be permitted); *United States* v. *Grimaud*, 220 U. S. 506 (rules and regulations for use of Government-owned forest reserves).

In its recent decision in the *Oil* cases this Court very clearly stated that in order for a delegation of power by Congress to the Chief Executive or an administrative body to be valid, certain essentials must be complied with. These are (1) the statute must define a policy; (2) a standard for

administrative action must be laid down in the statute; (3) the statute must provide for administrative procedure in accordance with due process of law, which procedure must include administrative findings of fact to demonstrate that the action taken has been in compliance with the prescribed standard.

It is important to note that Congress is required both to lay down a policy and to set up a standard. The word "policy" has been defined as a "settled or definite course or method adopted and followed by a government institution, body or individual". A "standard" has been defined as "a criterion, model or example, or an established rule". Webster's New International Dictionary, Second Edition, Unabridged (1935).

Let us examine some of the cases prior to the decision in the *Oil* cases in order to make clear the distinction between policy and standard and to determine whether or not both these requirements have uniformly been complied with in those cases in which this Court has held that there was no illegal delegation of legislative power.

In *Field* v. *Clark*, *supra*, the Congressional policy was to maintain American export markets and reciprocity of trade. The standard for Presidential action was a requirement that the President determine whether the Government of any country producing sugar, molasses, tea, coffee or hides had imposed duties or other exactions upon our agricultural or other products which, in view of the free list established by the Act, the President might deem to be reciprocally unequal and unreasonable, in which case he should not only have the power, but it should be his duty, to suspend the free introduction of those articles by proclamation to that effect, during which suspension the duties specified by the section should be levied.

In *Butfield* v. *Stranahan, supra,* the Congressional policy was to exclude the importation of inferior teas. Congress itself forbade the importation of inferior teas and as a standard for administrative action provided for the establishment of uniform standards of purity, quality and fitness for consumption, for all kinds of imported teas, on expert recommendation.

In *Hampton & Company* v. *United States, supra,* this Court dealt with the so called Flexible Tariff Act. The Congressional policy declared was to foster home industries by placing them on an equal competitive basis with foreign industries. The standard for Presidential action declared was the adjustment of tariffs to correlate them with changes in the relations between costs of production abroad and those in the United States. The President was definitely limited with respect to the extent of the changes he could make in the tariffs.

In *Union Bridge Co.* v. *United States, supra,* the policy declared was to remove obstructions from navigable waters. The standard for administrative action was the effect in obstructing navigable rivers of bridges of insufficient height and too great width of span.

In *United States* v. *Shreveport Grain & Elevator Co., supra,* the policy was to prevent the deception of consumers of foods and drugs. The standard for action was the requirement that the statement of quantity upon package or container labels be clear, the administrative delegate being permitted to make reasonable variations and exceptions.

In *United States* v. *Grimaud, supra,* the policy declared was the preservation and conservation of Government-owned forest reserves consistent with their reasonable use

by the public. The standard for administrative action was that depredations upon these reserves should be prevented and destruction by fires guarded against; hence, that there should be a limitation of user by regulation thereof, without, however, limiting ingress and egress to settlers and unreasonably preventing prospecting and developing operations.

The more recent cases on which the Government relies can be analyzed in the same manner. In the draft of the Government's brief important omissions have been made in discussing these more recent cases. For instance, it has been stated that the only policy or standard laid down in such statutes as the Interstate Commerce Act and the Federal Radio Act is contained in the expressions "when it shall appear in the public interest" and "as public convenience, interest or necessity requires". This is very far from the fact.

In *Chesapeake & Ohio Railway Company* v. *United States*, 283 U. S. 35, the Interstate Commerce Act as amended by the Transportation Act of 1920 was involved. This declared that no railroad should extend its line or construct a new line without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity. On page 42 of the opinion the Court referred to Section 5 (4) of the Interstate Commerce Act, which authorized the Commission to adopt a plan for the consolidation of railway properties into a limited number of systems. This Section, as this Court said, clearly discloses a policy on the part of Congress to preserve competition among carriers. It provided that "in the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing groups and channels of trade and commerce shall

be maintained." It therefore appears that a much more definite criterion than the public interest was supplied.

In *Avent* v. *United States*, 266 U. S. 127, which arose under Section 1, paragraph 15, of the Interstate Commerce Act as amended by the Transportation Act of 1920, this Court said, at page 129, that the Act itself

> "* * * authorizes the Interstate Commerce Commission, whenever it is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country, to suspend its rules as to car service and to make such reasonable rules with regard to it as in the Commission's opinion will best promote the service in the interest of the public and the commerce of the people; and also, among other things, to give direction for preference or priority in transportation or movement of traffic."

Needless to say, this presents a clear statement of Congressional policy and provides standards for administrative action.

In *New York Central Securities Corporation* v. *United States, et al.*, 287 U. S. 12, which involved an order of the Interstate Commerce Commission under Sections 5 and 20 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, permitting a carrier to acquire control by lease of the railway of another company, this Court, answering the contention that there had been an illegal delegation of legislative authority because the only stated criterion was the public interest, held that the purpose of the Act, the requirements it imposes and the context of the provision in question show the contrary. It spoke of the fact that the Transportation Act of 1920 went forward from a policy mainly directed to the prevention of abuses,

particularly those arising from excessive and discriminatory rates. It was designed to assure more adequate transportation service. The criteria established by the statute referred to the "transportation needs of the public", "the necessity of enlarging transportation facilities" and measures which would "best promote the service in the interest of the public and commerce and the people". It was thus held that the term "public interest" was not without ascertainable criteria but had a direct relation to the adequacy of transportation services, to its essential conditions of economy and efficiency, and to the appropriate provision for and best use of transportation facilities.

Similar observations can be made concerning the case of *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266. "Public convenience, interest or necessity" is not the only policy or standard set out in the Act involved in that case. As was noted by the Court, Congress by § 9, declared that the licensing authority should "as nearly as possible make and maintain an equal allocation" of licenses, wave lengths, time, station power, etc., to all zones; and the Commission was further directed to make a fair and equitable allocation of these factors "to each of the States, * * * within each zone, according to population." Indeed, in the *Oil* cases, at page 152, Mr. Justice Hughes comments on this case and refers to the fact that the statute itself had declared a policy as to "equality of radio broadcasting service, both of transmission and of reception" and that therefore the standard set up was not so indefinite as to confer an unlimited power.

In *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, the Alien Property Custodian was given the powers of a common law trustee and was authorized to dispose of alien property under rules to be prescribed by the Presi-

dent. The statute contained a proviso requiring sales to be made in the manner therein specified, unless the President, stating the reasons therefor, in the public interest should otherwise determine. The statute had previously restricted the power to sell alien property to cases where it would be necessary for the prevention of waste, but that restriction was removed because experience showed that such restriction defeated the purpose of the Act by bringing advantage to the enemy. The Court stated at page 9 of its opinion that the purpose of the Trading with the Enemy Act was not only to weaken enemy countries by depriving their supporters of their properties but also to promote production in the United States of things useful for the effective prosecution of the war. As shown above, the Act did set up certain standards which, although they could be departed from by the President in the public interest, nevertheless indicated a certain course of conduct. It cannot be doubted in any event that the standards laid down by Congress were far more definite than mere public interest.

It is further to be noted that in each and all of the cases we have considered above the statute had reference to a particular subject matter fully described, defined and limited by such description. For instance, in *Buttfield* v. *Stranahan* the subject matter was imported teas; in *Hampton & Company* v. *United States*, tariff duties; in *Union Bridge Company* v. *United States*, bridges over navigable waters; in *United States* v. *Shreveport*, foods and drugs; in *United States* v. *Grimaud*, Government-owned forest reservations; in *Chesapeake & Ohio Railway Company* v. *United States*, *Avent* v. *United States* and *New York Central Securities Corporation* v. *United States*, railroads; in *United States* v. *Chemical Foundation, Inc.*, enemy prop-

erty; in *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, radio broadcasting. In our case, however, there is absolutely no limitation in respect of the subject matter.

Furthermore in nearly if not all of the cases in which this Court has passed upon alleged illegal delegations of legislative power, the legislation was operative either in a field where Congress is not required to accord judicial review (*Crowell* v. *Benson*, 285 U. S. 22, 50) or in a field of actual or natural monopoly (railroads and radio broadcasting). In a field of the former character the rights of private property may be seriously affected by Governmental action, but no person has the constitutional right to protest against such Government acts as are involved in tariff-making, the conduct of foreign relations generally, the operation of Government-owned property, or those acts necessary to the carrying on of war, such as the seizure of enemy property, etc. The case of monopoly, actual or natural, is somewhat different. The right of Government regulation is necessarily primary, private rights being subordinated.

It is not surprising, therefore, that Congress has been permitted a freer hand in such fields, with respect to the delegation of such extraordinary powers, than could possibly be sanctioned in situations like ours where the attempt is drastically to regulate not only all private businesses engaged in interstate commerce, but all matters claimed in any way to "affect" interstate commerce.

If, in truth, the vast domain of all private business is open to regulation by Congress in the drastic manner contemplated in the Recovery Act, then it is surely true that private citizens directly affected are entitled to have Con-

gress itself lay down the legislative policies with definiteness, declare definite standards which are capable of guiding administrative action and properly restricting it, and to have provision made for quasi-judicial administrative procedure properly conforming to due process of law. Otherwise dictatorship is surely here, for the fact is that the Recovery Act attempts to override and ignore not only the limitations of the Commerce Clause, but the prohibition against illegal delegation of legislative power and the constitutional guarantees of substantive due process under the Fifth Amendment as well. It is a bold and unparalleled piece of legislation of the most sweeping and drastic character.

It cannot be denied that, if the past decisions of this Court still mean what they say, not even Congress (much less its delegates) has constitutional authority to fix minimum wages for purely private businesses, even when the declared purpose is protection of health and morals and even when the regulation is restricted to women and children and to a field in which Congress has the unquestioned power of control. *Adkins* v. *Children's Hospital*, 261 U. S. 525. It cannot be denied that the decisions of this Court with respect to maximum hours of labor go no further than to say that a legislature may restrict the hours of labor in limited situations to 8, 9 or 10 hours, and that the constitutionality of this restriction is definitely predicated solely upon a health relationship.

The Recovery Act throws overboard all these "old-fashioned" limitations; it does not even restrict minimum wages to women or children; it does not restrict them to particular industrial applications; it takes no account of the health or morals factors. In its administration it is

common knowledge that this bold attempt to dictate has spread out into every conceivable trade, industry, business or occupation, whether interstate or intrastate, even to barber shops and clothes pressing establishments. In the case of maximum hours of labor not the slightest attempt has been made in the statute or in its administration to relate the fixing of maximum hours to individual health. No consideration has been paid to the question whether or not the public has any real interest in the businesses, trades, occupations or industries regulated. The regimentation has been all pervasive and all inclusive, and liberty of contract has been utterly ignored.

We have discussed elsewhere the relationship of minimum wages and maximum hours of labor to the Fifth Amendment. Our preceding remarks have been made for the purpose of demonstrating the drastic nature of the regulations permitted by the Recovery Act and their vital effect upon all the activities of the most private and localized businesses, trades, occupations and industries. It must be admitted that even in the case of public utilities having monopolistic privileges such as the railroads, the electric and gas companies, etc., the power to fix minimum wages has been recognized only once by this Court and then only as a purely temporary measure to tide over a special and limited situation. *Wilson* v. *New*, 243 U. S. 332. It is now proposed to discard all limitations under the theory of a general emergency, to ignore the relationship of maximum hours of labor to public health or public safety and the possible relationship of minimum wages to public health, public safety, comfort and morals, and to relate the fixing of the same merely to the entirely vague concept of public welfare. It would seem to be obvious that no such plan should be permitted to prevail over time-honored constitutional guarantees.

6. The Decision in the Oil Cases clearly demonstrates an Illegal Delegation of Legislative Power in Section 3 of the Recovery Act.

In its recent important decision in the so-called *Oil* cases, (*Panama Refining Co.* v. *Ryan, et al., Amazon Petroleum Corp.* v. *Ryan, et al.*, 293 U. S. 388, 418) this Court said of Section 1 of the National Industrial Recovery Act:

> "It is manifest that this broad outline is simply an introduction of the Act, leaving the legislative policy as to particular subjects to be declared and defined if at all by the subsequent sections." (See also similar expressions on pp. 431, 432.)

The Court was there dealing solely with the regulation of oil production, and despite the fact that a separate section of the Recovery Act, to-wit, section 9 (c), attempts to lay down a legislative policy with specific respect to the prohibition of the shipment of "hot oil" (oil produced in excess of state quotas) in interstate commerce, this Court held that there had been an illegal delegation of legislative power by Congress to the President, since Congress had not decreed that "hot oil" should be forbidden to move in interstate commerce *but had merely authorized the President to determine whether or not it should be permitted so to move, without specifying the circumstances or conditions which should govern the President in his determination.*

With respect to the purely intrastate slaughtering and selling operations of the Schechters, the delegation of legislative power by Congress to the President is much more flagrant, for nowhere in the Recovery Act has Congress declared any policy whatsoever, no matter how indefinite or

vague; to govern these operations. The so called Live Poultry Code is in force, if at all, only by virtue of the scheme provided for in Section 3 of the Recovery Act. This section does not provide that live poultry slaughterhouse markets or any other trade, business or industry shall be regulated by codes of fair competition. *It merely provides that trade or industrial associations or groups may, if they so choose, formulate codes of fair competition and submit them to the President for approval.* If approved, the provisions thereof are to be the standards of fair competition for such trades or industries, and violations thereof, *in or affecting interstate commerce*, shall be misdemeanors. This manner of legislating seems to us to be precisely what is condemned by the Court in the *Oil* cases. It represents an abdication by Congress of its legislative power to the President.'

'To sustain the proposition that the use of the word "may", rather than "shall", in Section 3 (a) of the Recovery Act "does not render the delegation invalid", the Government cites certain cases in which delegations of power in permissive language have been upheld. In not one of the cited cases, however, does it appear that any question was raised as to the meaning to be assigned to the permissive language, and in most of such cases the particular provision in which the permissive language was used was a relatively unimportant part of the entire statute in question. Whether or not the absence of a mandatory duty affects the validity of a delegation of power in cases where the particular duty is subordinate or incidental, such cases fall far short of sustaining the Government's contention. The entire context of the Act and the contrasting employment of both mandatory and permissive phrasing throughout, as the subject may require, is conclusive against the Government. A duty to approve all codes not tending to monopoly or to restrain trade would in any event be devoid of practical obligation in view of the practical impossibility of determining these very controversial facts, at least without judicial procedure.

In a footnote to its discussion, the Government cites certain other cases to the effect that "may" imposes a mandatory duty "when used to define the powers of a public official." In none of these cases, however, was there involved any question of delegation, much less of the meaning of permissive language in connection with a delegation. The cited cases simply raised the question whether

Congress has never determined that the live poultry slaughterhouse markets in New York City require for their regulation a code of fair competition. It has adopted no policy with respect to the industry nor prescribed any guides for the President to follow in determining whether or not the industry requires a code of fair competition.

To make matters worse, Congress has nowhere stated in the Recovery Act what shall and what shall not be considered "fair competition" within that industry or within any industry. It has not even announced any standard or criterion of fair competition, no matter how indefinite. The statute baldly attempts to empower the President, with or without the assistance of trade associations, to write the law of fair competition which shall govern all those engaged in an industry, with their consent or without it. It is left within the absolute discretion of the President whether or not to approve a code of fair competition for a particular industry, which may or may not be submitted by a trade association. That legislation of this character is palpably unconstitutional is in our opinion clearly shown by the decision of this Court in the *Oil* cases.

What the Court said therein with respect to the unconstitutionality of Section 9(c) of the Recovery Act in that it unlawfully delegated legislative power to the President applies, it seems to us, *a fortiori* to Section 3 thereof authorizing the promulgation of codes of fair competition

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statutes in permissive language created positive rights (e. g., that trial "may be by court or on demand by jury", *Michaelson* v. *United States*, 266 U. S. 42. Not only do these cases fail to establish that in cases such as those at bar there exists a rule of construction requiring permissive language to be construed as mandatory, but they do not even establish any such proposition for cases of their type. See, for example, *Ritchie* v. *Franklin County*, 22 Wall. 67, cited by the Government.

for trades and industries. At page 414 of its opinion this Court first states that *the subject* to which the Presidential authority relates is defined as transportation in interstate and foreign commerce of oil produced in excess of the amount permitted by State authority. The live poultry slaughterhouse market industry, on the contrary, as we have before remarked, is nowhere mentioned in the Recovery Act, and no Congressional policy to regulate it, even a policy optional with the President, is set down with respect to it. Our case, therefore, for unconstitutionality seems ever so much stronger than the situation which this Court passed upon in the *Oil* cases.

Next the Court says that the question whether the transportation of "hot oil" shall be prohibited by law is obviously one of legislative policy. Likewise the question whether New York City live poultry slaughterhouse markets shall be regulated by a code is obviously one of legislative policy. Next the Court looks to the statute to see whether Congress has declared a policy with respect to the subject in hand, that is, whether Congress has set up a standard for the President's action, and whether it has required any finding by the President in the exercise of his authority to enact the prohibition against the interstate transportation of "hot oil". The Court concludes that Section 9(c) does not qualify the President's authority by reference to the basis or extent of the State's limitation of production, that it does not state whether or in what circumstances or under what conditions the President is to prohibit the interstate shipment of "hot oil", that it establishes *no criterion* to govern the President's course, that it does not require any finding by the President as a condition of his action. The same is true with respect to Section 3 providing for codes of fair competition, except

that monopoly and oppression of small business are required to be *negatived* before the President can act at all. The Court next says that so far as Section 9(c) is concerned, it gives to the President unlimited authority to determine the policy, to lay down the prohibition or not to lay it down as he sees fit, and disobedience to his order is made a crime punishable by fine and imprisonment. The same is precisely true of Section 3 with respect to the approval of the Live Poultry Code except that it does not provide for imprisonment.

The Court next examines the context of the Recovery Act to determine whether it furnishes a declaration of policy or standard of action which can be deemed to relate to the subject of "hot oil". It finds nothing in the balance of Section 9 (which section, in any event, is of no interest in our case). It then turns to the other provisions of Title I of the Act and consitlers in detail Section 1 which is termed in the Act a "declaration of policy," but which is found by the Court to be *simply an introduction* (p. 418). It remarks that this general outline of policy contains nothing as to the circumstances or conditions in which transportation of "hot oil" shall be prohibited in interstate commerce. It remarks that as to production, the section lays down no policy of limitation, that it speaks in general terms of the conservation of natural resources but prescribes no policy for the achievement of that end. It concludes that Congress did not undertake to say that the transportation of "hot oil" was injurious or unfair competition, that Congress did not declare in what circumstances the transportation should be forbidden or require the President to make any determination as to any facts or circumstances. Also that it did not require the President to choose "among the numerous and

diverse objectives broadly stated",[2] did not require the President to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary, and left the matter to the President without standard or rule to be dealth with as he pleased. The Court then concludes that no ingenious or diligent construction to supply a criterion permits such a breadth of authorized action as essentially to commit to the President the functions of a legislature rather than those of an executive or administrator executing a declared legislative policy. All of the above seems equally applicable to Section 3 and the Live Poultry Code but with far greater force.[3]

The Court then passes to the sections of the Recovery Act following Section 1 (p. 419). It remarks that Section 3 provides for the approval by the President of codes of fair competition for trades and industries, and that the authority is based upon certain express conditions which require findings by the President. An examination of this section clearly shows that the findings required have nothing to do with the conditions in New York City live poultry slaughterhouse markets, or any other trade, business or industry, affecting the necessity or propriety of the adoption of a code of fair competition for the industry. The findings required merely go to the representative character of the trade or industrial associations or groups proposing codes, to the non-existence of monopolistic conditions and oppression of small business. Hence the vitally necessary requisite that Congress

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[2]The Court might well have added "some of which are diametrically opposed to others."

[3]That Section 3, unlike Section 9, "incorporates by reference" Section 1, has no bearing, since this Court in the *Oil* cases assumed that Section 1 might be employed to aid Section 9, if it declared any policy.

prescribe the affirmative circumstances and conditions to govern the President in his approval of a code for a particular industry are clearly lacking. Nowhere in the Recovery Act are any such circumstances or conditions prescribed at all.

From the foregoing it can be clearly seen that the approval by the President of the United States of the Live Poultry Code was an unconstitutional exercise of delegated legislative authority, first, because Congress omitted to lay down any intelligible policy, or indeed any policy at all, for the governing of the industry; second, because Congress provided no standard to guide the President's action in determining whether a code of fair competition should be approved for any industry, much less for the intrastate operations of the live poultry business; third, because the President is not required to make and (as we shall later show) has made no findings of fact as to the necessity or propriety of a code of fair competition for the intrastate operations of the live poultry business to bring his act of approval within any standard for action that the Recovery Act may contain; and fourth, because Congress has set no limits as to what the "fair competition" provisions of such code may be, but on the contrary has left it to the unrestrained discretion of the President, without any judicial review, to write the law of fair competition for the intrastate operations of the live poultry business, without any procedure complying to any extent with the due process of law required of him.

In further support of our contentions two leading State court cases in courts of last resort of high reputation, one case before the advent of the Recovery Act and one case under a State Recovery Act, are directly in point. In *People v. Klinck Packing Company*, 214 N. Y. 121, the New York

Court of Appeals in an opinion concurred in by Judge Cardozo held a provision of an hours of labor statute unconstitutional because the Commissioner of Labor was permitted in his discretion to exempt employees engaged in industrial or manufacturing processes necessarily continuous, and in which the maximum labor day was 8 hours, from the provisions of the statute.[4] The Court said at pages 138 139:

> "The question whether the statute shall take effect in any, all, or no cases is left wholly to his volition. Under its terms he has the power without check or guidance, so far as we can perceive, to veto the entire clause and decide that its benefits shall never be extended to any case although it comes within the precise terms of the statute, or to permit the exemption in one case and deny it in another precisely similar one. Of course, it is not to be assumed that the commissioner of labor would intentionally be arbitrary and unreasonable in the exercise of this power, but nevertheless the legislature has attempted to confer upon him the opportunity which would permit of these shortcomings and we are to judge of a statute by what is possible under it. In the absence of any guide it might very well happen that an administrative officer with the best of purposes would nevertheless be very fallible in the execution of them."

In *Gibson Auto Co., Inc.* v. *Finnegan, Attorney General, et al.*, (March 5, 1935), 259 N. W. 420, the Supreme Court of Wisconsin held the Wisconsin State Recovery Act unconstitutional as an illegal delegation of legislative power. This Act was patterned after the National Recovery Act, the main distinction being that the Governor had no power to prescribe a code for a trade or industry if one was not.

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[4]Cf. Secs. 3 (a) and 10 of the Recovery Act.

presented to him by a trade or industrial association for approval. This does not really differentiate the case from ours, however, since the President or Governor has no more right to exercise legislative authority than an administrative body designated by the legislature.

After reciting the provisions of the State Recovery Act, which are closely in accord with those of the National Recovery Act, the Court stated its opinion that it was difficult to conceive of a more complete abdication of legislative power than that involved in the Act before it, in that the power to determine whether or not there should be a law at all was delegated. It further stated that the power to declare whether or not there should be a law, to determine the general purpose or policy to be achieved by the law, and to fix the limits within which the law should operate is a power vested by the Constitution in the legislature and may not be delegated.

The Court then contrasted the provisions of the State Recovery Act with another Wisconsin statute for the protection of the safety and welfare of industrial workers. This statute required employers to furnish safe employment and to furnish and use safety devices and safeguards and to use methods and processes reasonably adequate to render employment and places of employment safe and to do every other thing reasonably necessary to protect the life, health, safety and welfare of employees. The power, jurisdiction, and authority was given by the statute to the Industrial Commission to investigate, ascertain, declare and prescribe what safety devices, safeguards or other means or methods of protection are best adapted to render employees safe in their places of employment and to protect their welfare as required by law. The Court called attention to the fact that this Act did not give the Indus-

trial Commission or any other subordinate person, body or group the option to say whether in any particular line of industry there should be a safe place of employment. This the legislature reserved for itself, declaring the objects to be obtained as the protection of life, health, safety and welfare of employees, thus providing a definite objective in the achievement of which the Industrial Commission was merely to aid by filling in the details. The obvious differences between such a valid Act and the invalid State Recovery Act were noted by the Court. The same fundamental differences obtain between such a valid Act and the invalid National Recovery Act.

That the patent deficiencies of the National Recovery Act have been reorganized in high quarters may be gathered from the fact that the President in his message to Congress on February 20, 1935, said:

> "I recommend that the policy and standards for the administration of the Act should be further defined in order to clarify the legislative purpose and to guide the execution of the law, thus profiting by what we have already learned."

7. The Recovery Act prescribes no Constitutional Method or Procedure for ascertaining what are Unfair Methods of Competition, and in this respect totally Differs from the Federal Trade Commission Act.

The Federal Trade Commission Act (U. S. C. A., Title 15, Sections 41-51, 38 Stat. 717) declares "unfair methods of competition" unlawful, and then lays down a compulsory method of procedure and a complete scheme for examining into alleged "unfair methods of competition" and making findings in respect thereto. Five impartial Commissioners

are to be appointed by the President with the advice and consent of the Senate. This Commission is empowered to prevent persons from using "unfair methods of competition" in commerce. A definite and detailed procedure is set up. If the Commission has reason to believe that any person is using any "unfair method of competition" in commerce, or if it appears to the Commission that a proceeding would be to the interest of the public, it is required to serve a formal complaint upon the person accused, setting forth the charges. This complaint must contain a notice of hearing for a date and place certain. The person so served has the right to appear and show cause why an order should not be entered requiring him to cease and desist from the alleged unfair practice. Testimony must be taken and reduced to writing. The Commission must make findings of fact, and only after having proceeded in accordance with these requirements may it issue and cause to be served an order to "cease and desist".

To enforce the order the Commission must apply to a Circuit Court of Appeals. Notice must be given to the accused party. The Circuit Court of Appeals has the power to make and enter a decree affirming, modifying or setting aside the Commission's order. The findings of fact of the Commission are conclusive only if they are supported by evidence. The Court may order additional testimony to be adduced before the Commission. In such case the Commission may modify its original order. The judgment of the Circuit Court of Appeals is to be final except for a review by the Supreme Court of the United States upon certiorari. If the Commission does not appear before the Circuit Court of Appeals to enforce its order, the accused may move the Circuit Court of Appeals to set aside the Commission's order. In the hearings before the Commission depositions

and examinations of witnesses are provided for and the right of subpoena is given.

Thus, the finding by the Federal Trade Commission that a person has been guilty of what it considers an "unfair method of competition", is made subject to effective judicial review before any compulsory order may be made. The Circuit Court of Appeals is thus enabled to restrict the findings of the Federal Trade Commission as to what are "unfair methods of competition". Only after a final decree by the Circuit Court of Appeals is there any compulsion upon the accused to alter his conduct, and he can not be penalized in any way unless he violates the court decree.

Let us now examine the Recovery Act to see if any similar method of procedure is prescribed which is protective of an individual's rights to carry on a legitimate business in the competitive arena in a manner which is free and unfettered, as he is constitutionally entitled to do, except for conduct contrary to good morals, in restraint of trade or promotive of monopoly. *Federal Trade Commission* v. *Gratz*; 253 U. S. 421.

Section 3(a) provides for the formulation of codes of fair competition by trade or industrial associations or groups, but makes no mention whatsoever of what provisions these codes shall contain. When such a code has been formulated it is to be presented to the President of the United States for his approval. In approving such a code of fair competition the President is not restricted in any way, except that he must find that the trade or industrial association or group proposing the code is "truly representative" of the trade or industry or a branch thereof and has imposed no inequitable restrictions on admission to membership, and must further find that the code is not designed to promote monopolies or to eliminate, oppress or

discriminate against small enterprises. It is provided that the code shall not permit monopolies or monopolistic practices and it is further provided that where the code affects the services and welfare of persons engaged in other steps of the economic process they shall not be deprived of the right to be heard prior to approval by the President of the code.

There is nothing in this section or anywhere else in the Recovery Act which provides for notice to persons in the industry, particularly those not members of the applicant trade or industrial association, and no provision whatsoever is expressly made for a hearing to determine whether the provisions in the proposed code are properly contained therein. No evidence is required to be taken and no findings of fact are required to be made by the President except those we have mentioned above, which have no relation at all to the fairness or unfairness of most of the practices prohibited by the Live Poultry Code. Thus, in this respect the President is free to act in a purely arbitrary manner. A trade practice is denominated unfair simply by reason of the fact that the preponderant majority in the industry has ordained it to be such, and this without any required notice to other members of the industry, without any required hearing, without any requirement for evidence and without any requirement for findings of fact or judicial review. Thus, it is plain that the code may be formulated in a purely arbitrary and capricious manner, for it makes no difference that the National Recovery Administration may have customarily held informal public hearings to politely listen to the complaints of "persons engaged in other steps of the economic process." When presented for approval to the President his action in approving, rejecting or modifying the same may be utterly arbitrary and capricious, because he

need not say why he acts. Nevertheless as a result of the formulation of a code by an unofficial trade body in this manner and the approval thereof by the President, the wide range of prohibitions contained in such a code as the Live Poultry Code all become criminal offenses.

In the face of this remarkably loose and wholly informal procedure for the creation of crimes, it would seem appropriate to inquire whether the unofficial trade associations proposing the codes or the President in approving the codes are in any way restricted with respect to the provisions to be contained therein, the violation of which upon the President's approval is made criminal.

Section 7 of the statute requires certain labor provisions to be inserted in every code which the President approves. The statute can, however, be searched from beginning to end and no clue will be found to the problem of what other provisions may be inserted in a code. The codes are to be codes of "fair competition." These are words of large import. It does not seem that it was intended that the provisions of the codes were to be restricted to what was deemed "unfair competition" at common law or to what have been declared "unfair methods of competition" by the courts in construing the Federal Trade Commission Act.[8]

[8] In the draft of the Government's brief it is conceded that "fair competition" may be broader in scope than the "unfair methods of competition" in the Federal Trade Commission Act. It is claimed that the *clear* purpose of Congress was to forbid practices regarded by industry as "unfair" because of their tendency to destroy the price structure "without economic justification." This last term is a novel concept to us. It evidently means that the administrators of the Recovery Act may give their imagination full rein. Note for instance the claim that the lower the wages the poorer the chickens imported into New York. Those uninitiated into the mysteries of the new economics might pardonably think that the lower the wage bill the better the grade of the chickens which could be sold to the almost forgotten consumer for the same price.

The evident intention was to allow the freest latitude in formulating so-called codes of fair competition in order that the unofficial ideas of preponderant majorities in particular trades and industries, if they happened to coincide or could be made to coincide with the President's idea of "fair competition", might be enacted into law.

That such judgments of what is or is not "fair competition" are purely arbitrary and capricious there can be no doubt. It is common knowledge that in the actual formulation and approval of codes the concepts of "unfair competition" and "unfair methods of competition" have been carried to extremes never before dreamed of. Witness the great variety of provisions employed in numerous codes such as limitation of production, allotment of production, price-fixing, and the provisions of the Live Poultry Code itself requiring a certain number of employees to be hired for designated volumes of business. The obvious result, if this Court holds such procedure to be constitutional, is to thrust upon the courts the onerous duty of determining the propriety and legality of each and every provision in hundreds of codes, if they have any power at all to judicially review, except with respect to constitutionality, the Presidential fiats creating crimes out of acts not hitherto illegal or made illegal by Congress in the Recovery Act. This is in marked contrast with the Federal Trade Commission Act in which a careful sifting process is provided for.

The procedure prescribed in the Federal Trade Commission Act for defining and preventing the employment of "unfair methods of competition" is due process of law and adequately protects the business man. The procedure prescribed in the Recovery Act for the formulation and promulgation of codes of fair competition bears no resemblance whatsoever to due process of law.

This Court has in no uncertain way prescribed the procedure required to make administrative action conform to due process of law.[1] In *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company*, 227 U. S. 88, this Court held that the Interstate Commerce Commission must make findings of fact based upon evidence introduced before it in the particular proceeding, that all parties must be fully apprised of the evidence submitted or to be considered, must be given opportunity to cross-examine witnesses, to inspect documents and to file evidence in explanation or rebuttal. In no other way, this Court concluded, could a party maintain its rights or make its defence or test the sufficiency of the facts to support the finding. These principles were laid down in answer to the Govern-

[1] On June 27, 1933, at its first public hearing, the National Recovery Administration announced that inasmuch as the statute laid down no requirements for any public hearings upon codes of fair competition or any procedural requirements, it would determine its own procedure. It then stated that sponsors of codes would be called upon to present evidence on the various matters in Section 3 (a) respecting which the President is required to make findings. It further stated that persons offering objections to or modifications of any code provision or additional code provisions must file a specific statement in writing, requesting simply the elimination or addition of a specific provision, or a modification in language proposed by the objector. It further stated that under no circumstances would any party opposing a code be permitted to cross-examine or address any question to any proponent of a code. No mention was made that any evidence was desired as to whether the code would relate solely to transactions "in or affecting interstate or foreign commerce" or as to whether the proposed "unfair practice" code provisions were actually "unfair methods of competition" within the meaning of that term as it had been construed in judicial decisions. Mayers, "A Handbook of N.R.A." (Second ed., 1934), p. 192.

On June 29, 1933, the National Recovery Administration further announced that it was not making a record resembling a record of judicial proceeding or of a proceeding before such tribunals as the Interstate Commerce Commission or the Federal Trade Commission. It further stated that the recommendations of the Administrator to the President would be based upon all available information however obtained.

ment's contention that the Commission could act, not only on evidence produced in the particular proceeding, but also on any information which it might have gathered in performance of its duties, although not presented as evidence therein. This Court definitely said that it could not. The same principle was declared in *United States* v. *Abilene and Southern Railway Company*, 265 U. S. 274.

In *Crowell* v. *Benson*, 285 U. S. 22, this Court declared, at pages 47 and 48, that an award under the Longshoremen's and Harbor Workers' Compensation Act could not be made without proper notice or suitable opportunity to be heard and that all proceedings before a Deputy Commissioner upon a claim under the Act should be appropriately set forth and that whatever facts he might ascertain and their sources should be shown in the record and be open to challenge by opposing evidence and that facts known to him but not put in evidence could not support an award.

In *Wichita Railroad & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, at page 59, this Court said:

> "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.
>
> It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the

action of the Commission. We cannot agree to this."

In *Southern Railway Co. v. Virginia*, 290 U. S. 190, a very recent authority, this Court reviewed a Virginia statute purporting to authorize the State Highway Commissioner, without notice or hearing, to require railroads to eliminate grade crossings, whenever in his opinion this was necessary for public safety and convenience. The holding in the case was that due process of law had been denied because of the fact that the action taken by the State Highway Commissioner was without hearing, without evidence and without opportunity on the part of the railroad to know the basis therefor. The attempt to empower the State Highway Commissioner to so take property if and when he deemed it necessary for public safety and convenience, said this Court, at page 197, amounted to "the delegation of purely arbitrary and unconstitutional power." The railroad under such circumstances could have had no fair opportunity to demonstrate that the action of the State Highway Commissioner was arbitrary.

The Court further said at page 199: "The infirmities of the enactment are not relieved by an indefinite right of review in respect of some action spoken of as arbitrary." The fact that the Virginia Supreme Court of Appeals had held that a remedy by injunction was available to the railroad company was regarded by this Court as insufficient to alter its conclusions.

8. The President has made no Findings of Fact to bring his Action in approving the Code within any Policy or Standard which the Act may contain.

Not only are the first and second requirements of the *Oil* cases, to-wit: intelligible policies and reasonably definite

primary standards, not complied with, but the third requirement that there be findings of fact to demonstrate that the President has acted within the limits of his delegated authority, is also completely lacking. See also *Florida* v. *United States*, 282 U. S. 194, 215, *United States* v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454.

The Executive Order of the President approving the Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York, dated April 13, 1934, purports to be based upon the "reports, recommendations and findings" of the Secretary of Agriculture and the Administrator for Industrial Recovery. This Executive Order itself contains no findings of facts in any way adequate to meet the requirements of the *Oil* cases decision. In paragraph 4 thereof it is stated merely as a broad conclusion that the Code of Fair Competition constitutes a code of fair competition as contemplated by the Recovery Act and complies in all respects with the pertinent provisions of the Recovery Act including clauses 1 and 2 of subsection (a) of Section 3 of Title I of the Recovery Act (which merely provide that codes shall not be monopolistic or oppressive to small business). In paragraph 5 of the Executive Order the President states that the Code of Fair Competition will tend to effectuate the policy of Congress as declared in Section 1 of Title I of the Act. These are not findings of fact but merely conclusions or self-justifying statements merely following the words of the statute and are insufficient. *United States et al.* v. *Chicago, Milwaukee & St. Paul R. R.*, 294 U. S. 50. It is impossible by examining them to ascertain whether the President has acted within the limits of his authority or not. He does not even state by way of conclusion that Section 7 (a) has been

complied with. But most important of all he utterly fails to state, as the decision in the *Oil* cases requires, what circumstances or conditions he has found to induce him to approve the code, so that this Court may see whether the existing facts and conditions were in any way related to any legitimate object or policy prescribed by Congress in the Recovery Act, or, in any way to interstate commerce. Such action is purely arbitrary.

We turn to the documents upon which the Executive Order is based. These consist of letters of transmittal from the Secretary of Agriculture and from the Administrator for Industrial Recovery, respectively. The letter of the Secretary of Agriculture, dated April 10, 1934, to the President contains nothing but mere conclusions to the effect that the applicants for the code are truly representative of the industry; that the provisions of the code are regulations of transactions in or affecting the current of interstate and foreign commerce; that they are reasonable; that the code is not designed to promote monopolies or to eliminate, discriminate against or oppress small enterprises; that it will not prevent an individual from pursuing the vocation of manual labor or from dealing in farm products; and that it will tend to effectuate the declared policy of Title I of the Recovery Act as set forth in Section 1 thereof, the various clauses of Section 1 being then set forth *seriatim*. It is not stated which one or ones of these many, various and diverse objectives of Section 1 the code or particular provisions thereof will tend to effectuate. As in the case of the Executive Order, it is patent that there are no findings of fact here, but merely conclusions and self-serving statements from which a court reviewing the documents can form no opinion at all as to the propriety of the action taken.

The Administrator's letter, dated April 9, 1934, states that it is a report on those portions of the code which are subject to the jurisdiction of the Administrator for Industrial Recovery. He sets forth what the provisions as to maximum hours of labor and minimum wages are, and also states that the report of the Research and Planning Division indicates that this code will effect an increase in wages of about 20% in the industry and an increase in employment of 19.2%.

He does not find or indicate in any way the conditions or circumstances justifying or requiring the imposition of regulations for maximum hours of labor and minimum wages, nor the bases for the fixing thereof, nor does he find even as a conclusion that either, or both of these regulations, of themselves, as distinguished from the Live Poultry Code as a whole, will in any way effectuate the policy of Section 1 of the Act, or which of the many, diverse and contradictory policies they or the Live Poultry Code will tend to effectuate.

Neither the Executive Order of the President nor the Secretary of Agriculture's letter nor the letter of the Administrator for Industrial Recovery contains any statement which can possibly be construed as a finding that any of the competitive practices prohibited in the Live Poultry Code are actually "unfair methods of competition." For instance, the "straight killing" provision of the Live Poultry Code is certainly not an "unfair method of competition" within the meaning of the Federal Trade Commission Act. How can it be an unfair practice to permit a purchaser to buy goods, wares or merchandise of his own choice and to pay for them in accordance with their value? That is what "selective killing" amounts to. To term it an unfair practice is to interfere with ordinary business

methods and to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. Before the adoption of the Live Poultry Code, "selective killing" was always a lawful practice.

Furthermore, there are obviously no administrative findings of any kind whatsoever which relate the provisions of the Live Poultry Code to any of the alleged policies set forth in Section 1 of the Recovery Act. Neither the conditions nor the circumstances justifying or requiring the imposition of regulations for maximum hours of labor and minimum wages, nor the bases for the fixing thereof, are indicated in any way. It is not found even as a conclusion that either of these regulations of themselves, as distinguished from the Live Poultry Code as a whole, will in any way effectuate the policy of Section 1 of the Recovery Act, much less that either of these regulations or both will effectuate any particular one of the many, diverse and conflicting policies allegedly contained therein. And the same is true with respect to each and every one of the other provisions of the Live Poultry Code. None of the practices termed by the Live Poultry Code "unfair methods of competition" has been found by any administrative officer or the President to relate to any particular one of the many, diverse and conflicting provisions and "policies" in Section 1.

Furthermore, in none of the administrative documents referred to above is there any statement that such findings as may have been made were made upon the basis of the "evidence" introduced at the public hearing. It may well be the fact, and, if the usual manner of procedure in adopting codes of fair competition is any criterion, undoubtedly is the fact, that all sorts of extraneous "evidence" and information not offered at the public hearing, and hence not

accessible to interested persons for testing, contradiction and rebuttal, was considered by the administrative officers.[1] That findings, if not properly based upon publicly offered evidence are worthless, is amply demonstrated by the cases previously discussed.

9. The Provisions for Maximum Hours of Labor and Minimum Rates of Pay are Invalid Delegations of Legislative Power.

The terms "minimum rates of pay" and "maximum hours of labor" mean precisely nothing unless referred to some bases, criteria or standards. All they say of themselves is that no less shall be paid and no greater time shall be worked than may be prescribed by regulations not yet in being. It must be conceded that Section 7 contains no bases, criteria or standards for the fixing of either of these matters. We must therefore look either to the remainder of the Recovery Act, or attempt to determine whether judicial, or extra-judicial glosses (if they indeed be admissible) exist which are capable of transforming these wholly indefinite abstract expressions into concepts of sufficient definiteness to adequately canalize administrative action and to prevent it from being purely arbitrary. Resort to the remainder of the Recovery Act will be fruitless, as we shall later demonstrate. We therefore seek for admissible glosses.

First as to "maximum hours of labor." Numerous statutes have been enacted prescribing 10, 9 or even 8 hours

[1]The Government concedes that after the public hearing the Live Poultry Code was substantially changed on the basis of "the hearings" and "reports", the latter quite evidently not having been available at the public hearing.

a day as maxima in limited situations. The universal basis or justification has been the relationship to individual health.[1] So far as we know, no statute before the Recovery Act has ever attempted to grant to an administrative agency the power to fix the maximum number of hours for labor, either without any respect to the health factor or without any limitation as to persons and businesses affected. The courts have therefore never had the occasion to consider what "maximum hours of labor" in the abstract means, if anything. If they had ever had the occasion to do so, the only possible definition would have been something like this: the number of hours a man or woman can safely work with due regard to health under the particular conditions of particular industries.

The setting by the Live Poultry Code of 48 hours a week as the maximum work week in live poultry markets is, however, not even attempted to be justified on the score of health. The Government evidently concedes that the sole purposes of this provision as administratively construed are (1) to effect the sharing of work in order to relieve unemployment, and (2) to complement the minimum wage provision and hold up the wages and purchasing power of workmen by preventing the exaction of more work for the minimum wage than deemed desirable. The publicly known goal of administrative endeavor under a statute does not, however, import that goal into a statute or save it from illegal delegation of legislative power by providing a policy that Congress did not provide.

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[1] *Riley* v. *Massachusetts*, 232 U. S. 671; *Miller* v. *Wilson*, 236 U. S. 373; *Bosley* v. *McLaughlin*, 236 U. S. 385; *Holden* v. *Hardy*, 169 U. S. 366; *Muller* v. *Oregon*, 208 U. S. 412; *Bunting* v. *Oregon*, 243 U. S. 426.

Just as in the case of "maximum hours of labor," the gloss, if any, upon "minimum rates of pay" in judicial decisions and in sociological and economic literature points to policies and goals not embraced within the Recovery Act, either as it reads or as administratively carried out. Prior to the Recovery Act minimum wage laws were exclusively based upon the relationship of the wages required to the health and morals (as embraced in the term "decent living") of the individual employees, and justification was always attempted on these grounds.[7] *Adkins* v. *Children's Hospital*, 261 U. S. 525. These are obviously not goals of the present Act, which concerns itself solely with industrial recovery.[8]

We turn now to the Recovery Act to see if anything therein tends to define the terms. First, there is Section 1 of the Recovery Act entitled "Declaration of Policy" In the *Oil* cases this Court declared that this was "simply an introduction" to the Recovery Act. It refers vaguely, of course, to widespread unemployment, the undermining of standards of living of the American people (not merely employees in industry) the desired increase of purchasing power (without reference particularly to labor), relief of unemployment and the improvement of standards of labor. All of this is very vague and it is certainly no justification for the administrative fixing of minimum wages and maximum hours of labor.

The various objectives of Section 1 are referred to in the *Oil* cases as "the numerous and diverse objectives broadly stated"; as "the extremely broad description of widely different matters"; and again "the many and various objects generally described".

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[7]The *Wilson* v. *New* situation was unique and not typical.
[8]The Government so concedes.

The truth is that Section 1 attempts so much that it accomplishes nothing. It is palpably a device to mask a wholly complete delegation of legislative power. If Section 1 were the only guide, there is no action conceivable which the President could not take with respect to the regulation of industry and have it fit into one or more of the pigeonholes provided in Section 1. Its various clauses are mere pious hopes, not legal standards or definitions of policy. We need not labor the point, however, since it would clearly appear that this Court has definitely disposed of this section, whether considered as an introduction to Section 9 (oil regulation) or to the preceding sections, by terming it "simply an introduction" and refusing to regard it as a substantive declaration of policy or prescription of standards for administrative action.

In any event it is hopeless to attempt to relate such undefined concepts as "maximum hours of labor" and "minimum rates of pay" to any of the "many and diverse objectives" of Section 1. As many or more people think "purchasing power" is increased by long hours as have espoused the "new-fangled" idea to the contrary. At any rate, Congress certainly did not ordain which policy should be adopted. There is the same disagreement in opinion with respect to relief of unemployment, as to whether a policy of high wages or low wages will best succeed. All Congress has decreed is that the regulation of hours and of rates of pay shall be optional with the President, without prescribing in any way how these regulations shall be carried out. In improving standards of living, long hours (and even low pay at least in the long run) may well succeed, where the opposite policy will fail. Certainly the "fullest possible utilization of the present productive

capacity of industries" is promoted by long hours, not short. Thus the alleged standards of Section 1 do not in any way make more definite or limit the wholly unlimited authorization in Section 7 for "maximum hours of labor" and "minimum rates of pay".

Lastly, we look to Section 3 and to the term "fair competition" to see if it in any way helps to define "maximum hours of labor" or "minimum rates of pay". Certainly no decision of this Court, or of any other so far as we are aware, has ever held that hours of labor or rates of pay to workmen have any relation to the well-known concepts of "unfair competition" or "unfair methods of competition." See *Howe Scale Co.* v. *Wycoff*, 198 U. S. 118; *Hanover Co.* v. *Metcalf*, 240 U. S. 403, 412; *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427-8. The idea seems to have originated with well-intentioned social welfare workers, who never having had to meet a payroll, seem to feel that it is more unjust for a business to pay employees what it can than to leave them unemployed.

Thus the upholding by this Court of the definiteness of the term "unfair methods of competition" in the Federal Trade Commission Act has no bearing here, and the attempt to justify the imposition of maximum hours of labor or minimum rates of pay as being "unfair competition" is wholly unjustified. Unfair competition at common law was limited to the "passing off" of one's goods for another's. *Howe Scale* v. *Wycoff*, *supra*; *Hanover Co.* v. *Metcalf*, *supra*. For this reason the expression "unfair methods of competition" was employed in the Federal Trade Commission Act. We are unable to find that either prior to that Act or subsequent thereto this Court has ever sanctioned the idea that "long" hours of labor or "low" rates of pay might

be included within the terms "unfair competition" or "unfair methods of competition". In *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, this Court said at page 427:

> "The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine, as a matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

It is idle to argue, as the Government does, that it would not have been feasible for Congress to lay down a reasonably definite standard with respect to "maximum hours of labor." We do not claim that the policy or standard which Congress would have to lay down need be precise and inflexible as, for instance, an 8-hour day for all industry, although it may not be amiss to note that just such a legislative proposal is now being seriously advanced in the case of the 30-hour week bill now before the Congress. Surely Congress could easily have set upper and lower limits in the case of maximum hours of labor as was done in the case of the gold legislation. As matters stand at present, the President is free arbitrarily to prescribe a 10-hour week for one industry and an 80-hour week for another. He is likewise free to make minimum wages for one industry $5 a week and for another $100 a week, and need pay no heed to the financial ability of the employers

to pay. Thus the power to ruin any business or industry lies in his hands, if these delegations be sustained. The truth is that these provisions were drafted with voluntary codes in view and cannot possibly be applied to those who do not see fit to join in the application for a code.

Lastly it is to be noted that the imposition of maximum hours of labor and minimum rates of pay upon businesses and industries by the President, the latter of which has been referred to by this Court as the "heart of the contract", is not required to be governed in any way by the nature of the industry or business. Healthy industries and businesses are within the reach of the power equally with unhealthy industries and businesses. Industries or businesses affected with a public interest or which, owing to their peculiar nature, seem to demand regulation in the public interest, are not distinguished in any way from businesses or industries of which this cannot be said. All businesses and industries are grouped indiscriminately and the President may regulate at will those which he selects in his unrestrained and absolute discretion.

10. The Manner in which the Legislative Powers Illegally Delegated in the Recovery Act have actually been Exercised.

The Recovery Act authorizes the President to re-delegate the almost illimitable powers conferred on him by the Act to various commissions, bureaus, officers, and other agencies. The result is that these various bodies and functionaries have the power to make the laws of the United States. It is common knowledge that it is impossible for an ordinary citizen to know what these laws are, not only be-

cause of their tremendous volume, but also because they are constantly shifting and changing and because nowhere can be found a comprehensive collection of the thousand and one enactments which are almost daily ground out by these agencies and which in many cases are unintelligible and inconsistent.

In the report of the special committee of administrative law, submitted to the 57th Annual Meeting of the American Bar Association, the following description of these laws appears at pages 215-216:

> "The practice of filing Executive Orders with the Department of State is not uniformly or regularly followed, and the totals are really greater than above indicated. Some orders are retained or buried in the files of the government departments, some are confidential and are not published, and the practice as to printing and publication of orders is not uniform. Some orders are made known and available rather promptly after their approval; the publication of others may be delayed a month or more, with consequent confusion in numbering. The comparatively large number of recent orders which incorporate provisions purporting to impose criminal penalties by way of fine and imprisonment for violation is without numerical precedent in the history of the government.
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> "Of the recent output, approximately half have been issued under or pursuant to the National Industrial Recovery Act, and have had to do either with its administration, agencies, and appropriations, or with the approval of codes and amendments thereof.
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> "The total volume above stated does not include the contents of the codes and amendments, all of which according to the act, have the force and effect of law and violation of any provision of which is a

criminal offense. To June 25, 1934, 485 codes and 95 supplements have been approved, averaging 10 closely printed pages to each code and supplement. Of these, approximately 226 codes and 7 supplements were approved by Executive Orders of the President, 242 codes and 88 supplements were approved by the Administrator for Industrial Recovery, 16 codes by the Secretary of Agriculture and 1 general code by the Petroleum Administration, all under authority delegated by Executive Order. Most of the codes established 'quasi-administrative' agencies, called 'code authorities' under which were pyramided a whole hierarchy of countless divisional, regional and local agencies, and many of which were given a measure of legislative power. It would be impossible to calculate the volume of 'law' made by these agencies.

"To June 16, 1934, the Administrator for Industrial Recovery had issued 2,998 administrative orders, approving or modifying codes, providing for exceptions and exemptions therefrom, and covering a multitude of other activities of a legislative order. Countless 'interpretations' of codes have been issued by the NRA and the many code authorities, of which there is no real record or indexing, or even any trustworthy source of information. Finally, and perhaps most astonishing of all, the NRA has adopted numerous regulations and sets of regulations which are to be found scattered among 5,991 press releases issued up to June 22, 1934, and the NRA staff itself has not segregated such press releases having a legislative effect from those of an informational or news character.

"The total legislative output by, or in connection with, this one administrative agency staggers the imagination. Any calculation involves guess-work but a safe guess would be that the total exceeds 10,000 pages of 'law' in the period of one year.

This figure may be compared with the total of 2,735 double-column pages which comprise the total Federal statute laws as set forth in the Code of Laws of the United States and the cumulative supplement of 1933. When the legislative production of other Federal administrative agencies is taken into account, it should not be difficult to demonstrate that the total volume of administrative legislation now in force greatly exceeds the total legislative output of Congress since 1789."

Some idea of the volume of "law" which has been produced can be obtained from the following summary:

"In the first year of the National Recovery Administration, 2,998 administrative orders were issued. In addition to these, the Recovery Administration has adopted numerous regulations and sets of regulations which are to be found scattered among 5,991 press releases during this period. It has been estimated that the total amount of 'law' evolved during the first year of the NRA's activities exceeds 10,000 pages, probably a greater volume than the total amount of statute law contained in the United States Code." Erwin N. Griswold, "Government in Ignorance of the Law—a Plea for Better Publication of Executive Legislation:" 48 Harvard Law Review 198, 199 (1934).

When it is taken into consideration that this Live Poultry Code is only one of many hundreds; that in the first year of the National Recovery Administration 2,998 administrative orders were issued and that its additional rules and regulations were scattered through 5,991 press releases and that this constituted but a part of the mass of regulations, orders and rules, issued by agencies of Government possessed of the power to make rules and regulations

having the effect of law, it can be safely asserted that we have now "*government in ignorance of law.*"[1]

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[1]An illuminating discussion of code making under the National Industrial Recovery Act is contained in an address by Gilbert H. Montague, entitled "Lawmaking by Executive Flat under the National Industrial Recovery Act", before the New York State Bar Association on January 25, 1935, Vol. LVIII, Reports of the New York State Bar Association.

The following is a partial paraphrase of Mr. Montague's description of code making:

The routine procedure customarily followed in the formulation and adoption of codes of fair competition does not afford business men vitally interested in what the provisions of a code shall be any real opportunity to oppose provisions unsatisfactory to them. It is true that prior to the public hearing they may talk among themselves and may be "heard" at the public hearing if they happen to know about it. But the full opportunity required by due process of law to test, explain or controvert all probative matter considered in reaching a decision is not granted.

The normal procedure is that the association or group desiring the code appoints a code committee which informally confers in private with a Deputy Administrator, who necessarily has only a sketchy knowledge of the industry and who must reply upon whatever information is afforded him by the code committee or upon such information as he may receive from representatives of various advisory boards, such as the Consumers' Advisory Board, the Labor Advisory Board and the Industrial Advisory Board. In these conferences a rough draft of the code is hammered out and is submitted at a public hearing. This hearing is called by affixing a notice upon a bulletin board in the Department of Commerce Building, and persons to be affected by the code may or may not learn of the hearing.

The public hearing is the only opportunity for persons "engaged in other steps of the economic process" to which the particular code relates to be heard and objections may be made by them either orally or in typewriting.

Subsequently, a number of conferences between the code committee, the Deputy Administrator in charge and the representatives of the various Advisory Boards are held, at which numerous changes are frequently made in the text of the code as presented in the public hearing. Neither the changes themselves nor the factual information on which they are based are necessarily or even customarily made public before the approval of the code, although the changes may vitally affect the import of the code.

Eventually, the Deputy Administrator obtains memoranda, data and reports from the various Advisory Boards and makes recommendations to the supervisory Board which the President has designated

In considering this question of improper delegation of legislative power, it is well also to bear in mind that, while under the Recovery Act the only methods of enforcement provided by statute are criminal prosecutions and injunctive proceedings in the Federal courts and proceedings before the Federal Trade Commission reviewable in the Federal courts, the various administrative agencies assume the power to sit in judgment upon individuals whom they have chosen to accuse of code violations with no right of judicial review of their sentences. Accusations have been made, tried, sustained and punishments imposed and with relatively few exceptions no effort has been made to use the methods of enforcement provided by the Recovery Act, but employers have been kept in line by using the coercive force of Government boycott, compliance has been enforced by depriving persons charged with code violation of the use of the Blue Eagle, of the right to compete for Government contracts, by forbidding all contractors engaged in Government work to purchase materials or supplies produced or furnished, in whole or in part, by one who has not complied with the code, by withholding financial aid extended to industry by the Reconstruction Finance Corporation, and by threatening to revoke the licenses of radio broadcasting stations which do not deny their facilities to advertisers "who are disposed to defy, ignore or modify the codes established by the NRA."

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to succeed to the powers of the Administrator for Industrial Recovery. Such recommendations may or may not follow the memoranda, data and reports submitted by the Advisory Boards and may differ vitally from the recommendations of the code committee. The supervisory Board may then approve the code in the form recommended by the Deputy Administrator or it too may make important changes therein. After the supervisory Board has given its approval the code goes directly to the President for final approval without any further public hearings of any kind.

SUBDIVISION II OF PART I—COMMERCE CLAUSE AND FIFTH AMENDMENT

THE SCOPE OF THE RECOVERY ACT AND THE CODES THEREUNDER. THE FULL SIGNIFICANCE OF THE ADMINISTRATION'S VIEW OF THE EXTENT OF FEDERAL POWER UNDER THE COMMERCE CLAUSE.

1. The Government's interpretation of the Recovery Act and of the Commerce power.

The Federal power under the Commerce Clause has here been exerted to decree that a person privately employed in a slaughterhouse in Brooklyn, New York, shall not be permitted to work more than 60 hours per week; and that his employers, who are engaged solely in the business of acquiring, slaughtering and selling chickens for local consumption after they have completed an interstate journey and come to rest as part of the general mass of property within the State, must pay him not less than 50c per hour for his services. The novelty of this extension of the Federal power was adverted to by the courts below[1] and has been conceded by the Government.[2] While it has been necessary for these defendants to prepare this brief in advance of the receipt of any brief from the Government,[3] the construc-

[1]R. 150, 1661-1663.

[2]Brief for the United States in this case in the court below, p. 20. See, Brief for the United States in *United States* v. *Belcher*, No. 628, of the present term in this court (p. 113).

[3]As previously stated, a preliminary draft of the Government's brief was received after the text of this brief was written. There is nothing in the preliminary draft of the Government's brief (as appears from a hasty examination thereof) which calls for any change in the general treatment of the case in the defendants' brief. To the extent

tion given by the Administration to the Constitution, and to the Recovery Act, in order to justify this bald interference with the liberty guaranteed by the Constitution to the citizen, both employer and employee, and this extension of Federal power into fields of local activity specifically reserved by the Constitution to the States, is not in doubt. It is apparent on the face of the statute; from the consistent administrative construction of it as embodied in the code here involved and in other codes; and from the defense which the Government has made of it in judicial tribunals, both in the courts below in this case, and in other cases.

On its face the Recovery Act goes beyond the language of the constitutional grant. The Constitution empowers the Congress "to regulate Commerce * * * among the several states" (Art. I, Sec. 8, clause 3). The Recovery Act, on the other hand, extends the Federal power to regulate, among other things, the wages and hours of employees "in any transaction *in or affecting* interstate or foreign commerce"[4] (Sec. 3(b), Sec. 3(c), Sec. 3(f), Sec. 4(b)). The code involved in this case, in common with many other codes, is not limited to the regulation of transactions in interstate commerce, but on its very face purports to govern

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that time permits, specific references will be made to certain portions of the Government's brief although reference by page number will be impossible. It may be that all of the contentions of the Government as to the scope of the commerce power made by it in the court below and in other kindred cases (upon the basis of which this brief has been written) are not specifically renewed by the brief of the Government in this case, but the logical consequences of the Government's contention in this case, as to the scope of such power, are such as to draw within it all such contentions hitherto made and herein referred to.

[4]That the Administration's construction of this statute, as detailed in the following discussion, is correct, would appear from the use of the disjunctive "or" between "in" and "affecting".

> "*every person* engaged in the business of selling, purchasing for resale, transporting or handling and/or slaughtering live poultry, from the time such poultry comes into the New York Metropolitan Area to the time it is first sold in slaughtered form" (Art. 11, Sec. 1, R. 15-16) (Italics ours).

The wage and hour counts of the indictment in the instant case are therefore consistent with the language of the Recovery Act and of the code in charging, without more, that the violation of the Federal law, of which these defendants are guilty consists in "affecting" interstate commerce by making a contract with an employee in their slaughterhouse business in Brooklyn prescribing mutually satisfactory terms as to hours and wages, (R. 101-102; 111-112, 47). This is said to give the defendants an advantage over other slaughterhouse men who pay employees code wages for code hours, which, it is said:

> "prevents the accomplishment of the purposes of said Code, and of the said National Industrial Recovery Act, causes a disruption in the normal flow of the interstate commerce in live poultry coming into the State of New York from other states, and diverts substantial interstate shipments of such poultry" (R. 97, see R. 102; R. 107, see R. 112).

Construing the Recovery Act, the Government frankly argued in its brief in the court below in this case that:

> "if a transaction affects interstate commerce to any extent, however slight, it is within the literal meaning of Section 3(f) of the Recovery Act" (p. 25);

that

> "it is entirely unnecessary to establish that the specific violations substantially affected interstate commerce" (p. 23);

and that to give the Recovery Act any narrower construction

> "would conflict with the general tenor of Title I, which shows no tendency to stop short of a complete exercise of the federal commerce power" (p. 25).

The Government further argued that

> "the power to legislate as to general trade practices merely 'affecting' interstate commerce though never before so broadly expressed, has been recognized since the earliest case dealing with the commerce clause" (p. 20); and
>
> that "it is immaterial" that the activity regulated occurs only "after the physical transportation has ended and the subject matter has come to rest within a state" (p. 26).

In short, the Government takes the affirmative position that the Federal power under the Commerce Clause extends to any and all transactions which "affect interstate commerce" and that the Recovery Act was enacted and is being administered upon that theory. The phrase "affect interstate commerce", it is said, "has come to have an established and somewhat technical meaning", and the Government defines it as follows:

> "A transaction is said to affect interstate commerce when, without being 'in' interstate commerce, it stands in such a relation to interstate commerce as to be subject to the federal commerce power" (p. 24).

This of course begs the question. The question is what transactions "affecting" interstate commerce, without being

"in" interstate commerce, are subject to the federal commerce power. The government answers "all".

The view thus taken by the Government in the court below was also the ground of its brief in this Court in the *Belcher* case, and must constitute the basis of its argument in this case in this Court, unless it has recently changed its position. In the *Belcher* brief this Court was told that there is no closed class or category of transactions "affecting interstate commerce" (p. 72); that the question is one of economic fact to be determined anew in each case (p. 103); and that the limits of this new doctrine are to be worked out by the process of judicial inclusion and exclusion (pp. 93-94), with the function of the courts limited by the rules relating to the presumption of the constitutionality of legislative acts, and of the regularity of administrative and executive proceedings (pp. 116-117, 118).

The Government nowhere contends that the power thus asserted is anywhere conferred upon the United States by the express language of any grant in the Constitution. It points to no precedents in our national history for the exertion of such a power by the Federal Government, but on the contrary expressly admits that this statute goes beyond anything which the Federal Government has ever attempted heretofore. "Judicial precedents construing prior exercises of the commerce power," this Court was told in the Government's brief in the *Belcher* case, "are of little value in the present connection, because Congress had never before attempted to deal in a national way with a national breakdown of commerce" (p. 113).

It is true that despite this apparent frankness the Government attempted in the court below, and in its brief in the *Belcher* case, and will doubtless attempt in this Court,

to justify this theory of constitutional "construction" upon the basis of decisions of this Court which have upheld the national authority to reach intrastate transactions as an incident to the protection of freedom of that which is concededly interstate commerce and in order to protect such commerce from contracts, combinations, conspiracies or acts of individuals, or from regulations of States, which "directly and substantially, and not merely indirectly, remotely, incidentally and collaterally," "and not as a mere incident to other and innocent purposes" "limit or restrain, and hence regulate interstate commerce." (*Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 228, 229.) The grounds and limits of these exceptional decisions are discussed elsewhere in this brief. As the Circuit Court of Appeals in this case pointed out, the argument which the Government bases upon them is one which assumes to draw general principles from statements in opinions in particular cases without regard to the facts of the particular case or the scope and purpose of the statute involved in such cases, and that the argument "appears formidable only in case the conclusion is surreptitiously introduced during the reasoning" (R. 1662-1663).

The theory of the Recovery Act, as appears by its terms and by the Administration's construction of it, is that Federal regulation of intrastate activity is the rule and not the exception. The real question in this case is not whether some or any of the activities of these defendants might not be reached by the Federal Government as an incident to the enforcement of a proper statute directed to the regulation of commerce among the several states. (*Cf. Local 167* v. *United States*, 291 U. S. 293.) The issue is not whether the principles of the Constitution as exemplified in the supremacy clause shall continue

to be construed, as they have been in the past, to give the Federal Government such authority over intrastate transactions as is necessary to permit it adequately to make bona fide provision for the regulation of interstate commerce. The question, as disclosed by the statute and the Government's arguments in its support, as well as by consistent methods of its administration for nearly two years, is not whether there shall be adequate "play in the joints of government" to permit of the regulation of interstate commerce. The issue is whether the Constitution is to be disregarded and governmental assumption of the power to regiment all individual commercial activity and all industry—whether commerce or not and whether interstate or not—is to be sustained.

2. The scope of the Recovery Act as evidenced by the codes enacted thereunder.

In its brief in the *Belcher* case, the Government contended:[1]

> "The decision [of the particular case before the Court] cannot be affected by suggestions that if the present power is sustained it will extend to subjects which have only a fanciful relation to interstate commerce. No such suggestion has heretofore prevented the process of judicial inclusion and exclusion from resting upon the facts of the case presented for decision" (p. 94).

It is true that the rule of decision of this Court is not to go beyond the facts for the decision of particular cases. That rule has not, however, resulted in this Court closing

[1]The contention is repeated in the draft of the Government's brief in this case in this Court.

its eyes to the necessary effect of its decision upon matters not directly involved in the suit at bar. Thus, in *Norman* v. *B. & O.*, 294 U. S. , recently decided, the Court recognized that although the case then before it involved the contracts of private parties only, the principle to be decided necessariiy also related to the contracts of states, municipalities and other political subdivisions, and it proceeded to rule expressly upon the status of such obligations, even though no question in respect of such an obligation was presented in the case then at bar.[1a] In the instant case, we submit, the public interest requires, just as strongly as it did in the Gold Clause Cases, that the Court take notice of the effect of its decision, not only upon these defendants, but upon the people of the nation as a whole. The code involved in this litigation is not an isolated piece of regulation. The official publication of the codes approved and promulgated under the Recovery Act fills no less than 19 closely-printed volumes of the edition issued by the National Recovery Administration, and, as will be shown, purports to regulate a vast range of activities covering wide fields of human endeavor and a large number of persons.

The Government's suggestion as quoted at the outset of this section clearly intimates either that the Federal power under the Commerce Clause and under this Act will not be extended to subjects which have only a fanciful relation to interstate commerce or it suggests that this Court should close its eyes to the fact that it has already been so extended. That the latter only can be the meaning

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[1a] In *Norman* v. *B. & O.* the Court stated:

> "The instant cases involve contracts between private parties, but the question necessarily relates as well to the contracts or obligations of States and municipalities, or of their political subdivisions, that is, to such engagements as are within the reach of the applicable national power."

is clearly demonstrated by a consideration of a few of the codes which have been promulgated and placed in operation under this statute. It is not too much to say that these codes purport to regulate human activities literally from the cradle to the grave and beyond. Thus there is a Code of Fair Competition for the Infants' and Children's Wear Industry covering "the manufacture of infants' and children's wear"[2]; there is a Code of Fair Competition for the Funeral Service Industry which covers "any person, firm, corporation or other form of enterprise, engaged in the preparation of dead human bodies, for burial"[3]; a Code of Fair Competition for the Retail Monument Industry covering "the retail selling, designing, lettering, cleaning, erecting and repairing of monuments and such manufacturing, building and setting up as is incidental thereto"[4] and a Code Supplement regulating the trades of jobbers, distributors, dealers, manufacturers and assemblers of hearses and ambulances[5].

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[2] Approved Code No. 373, approved March 27, 1934, Vol. VIII, page 607, Codes of Fair Competition issued by the National Recovery Administration [Volume references hereinafter cited are to this edition].

[3] Approved Code No. 384, approved April 4, 1934, Vol. IX, page 155. This code covers: "any person, firm, corporation or other form of enterprise, engaged in the preparation of dead human bodies, for burial or disposal by embalming or other sanitary methods and/or directing and supervising funeral services prior to burial or disposal, and/or the sale of funeral merchandise at retail, and shall include all persons, firms, corporations, or other forms of enterprise, maintaining a mortuary, funeral home or other similar establishment and/or using in connection with their name and business, the words 'funeral director', 'mortician', 'undertaker', or any other title or words of similar meaning and import and such branches or subdivisions as may from time to time be included under the provisions of this code."

[4] Approved Code No. 366, approved March 26, 1934, Vol. VIII, page 511.

[5] Supplement to Code of Fair Competition for the Automobile Manufacturing Industry covering fair trade practices for the Funeral Vehicle and Ambulance Subdivision of the said Industry, approved November 8, 1933, Vol. II, page 671.

These codes state no facts to show that the business regulated has any relation to interstate commerce or that the regulation will have any effect upon such commerce other than the hoped for increase in general prosperity through the raising of wage levels and the spreading of work. Notwithstanding this, all these codes, and those hereinafter referred to, with few exceptions, are accompanied by a report of the Federal Administrator containing the standard finding substantially as follows:

> "I find that:
>
> "(a) Said Code is well designed to promote the policies and purposes of Title I of the National Industrial Recovery Act, including removal of obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof and will provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among the trade groups, by inducing and maintaining united action of labor and management under adequate governmental sanctions and supervision, by eliminating unfair competitive practices, by promoting the fullest possible utilization of the present productive capacity of industries, by avoiding undue restriction of production (except as may be temporarily required), by increasing the consumption of industrial and agricultural products through increasing purchasing power, by reducing and relieving unemployment, by improving standards of labor, and by otherwise rehabilitating industry."

There are also codes which on their face and by express terms exclude the suggestion that they constitute a regulation of interstate commerce, such as the Code of Fair Competition for the Transit Industry, which covers, *inter alia*,

"automotive buses transporting passengers solely within State lines, except when engaged in interstate commerce."[6]

Many other codes have also been established in relation to subjects which, it can fairly be said, have only a fanciful relation to interstate commerce. In this category there is included a Code of Fair Competition for the Barber Shop Trade, which regulates, *inter alia*, "shaving and trimming the beard, cutting and dressing the hair, and rendering kindred personal services, principally to males, for compensation," which includes bootblacks and brush-boys, and "any person in a barber shop engaged in the business of caring for and treating the finger nails."[7] The text of this code nowhere mentions interstate commerce, notwithstanding which the Executive Order approving it states, as is the general practice, that it is approved upon an application made "pursuant to and in full compliance with the provisions of Title I of the National Industrial Recovery Act" (Vol. IX, p. 331), and the accompanying report of the Administrator contains the standard "finding" previously quoted, including the finding that "Said Code is well designed to promote the policies and purposes of Title I of the National Industrial Recovery Act, including removal of obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof * * *" (Vol. IX, p. 335).

There is a similar code for the Bowling and Billiard Operating Trade which covers the "furnishing for a consideration of facilities and equipment for bowling and billiards"[8]; for the Motor Vehicle Storage and Parking

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[6]Approved Code No. 28, approved September 18, 1933, Vol. I, page 371.

[7]Approved Code No. 398, approved April 19, 1934, Vol. IX, page 331.

[8]Approved Code No. 346, approved March 17, 1934, Vol. VIII, page 221.

Trade[9]; for the Cleaning and Dyeing Trade[10]; for the Shoe Rebuilding Trade, covering "the repairing, rebuilding and remodeling of any and all kinds of foot-wear and the performance of all work incidental thereto" and also covering bootblacks[11]; for the Advertising Display Installation Trade[12]; for the Merchant and Custom Tailoring Trade[13]; for the Real Estate Brokerage Industry, including the activity of acting as a representative in the buying, selling, exchanging or leasing of real property and writing insurance and the negotiation of loans on real property, as an adjunct to the Industry[14]; for the Retail Trade including the "selling of merchandise to the consumer and not for purposes of resale in any form"[15]; for the Burlesque Theatrical Industry covering practices and hours and wages of employees in "a type of musical entertainment known in theatrical parlance as burlesque"[16]; and for the Laundry Trade, including "the washing and ironing of articles of clothing," etc.[17]

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[9]Approved Code No. 147, approved December 7, 1933, Vol. III, page 577.

[10]Approved Code No. 101, approved November 8, 1933, Vol. II, page 547.

[11]Approved Code No. 372, approved March 27, 1934, Vol. VIII, page 593.

[12]Approved Code No. 240, approved January 30, 1934, Vol. V, page 601.

[13]Approved Code No. 494, approved July 31, 1934, Vol. XIV, page 47.

[14]Approved Code No. 392, approved April 9, 1934, Vol. IX, page 259.

[15]Approved Code No. 60, approved October 21, 1933, Vol. II, page 27.

[16]Approved Code No. 348, approved March 20, 1934, Vol. VIII, page 257.

[17]Approved Code No. 281, approved February 16, 1934, Vol. VI, page 487.

All of these codes provide minimum wages and maximum hours for employees. The report of the Administrator to the President which accompanies a number of these codes (such as that for the Burlesque Theatrical Industry; that for the Advertising Display Installation Trade; and that for the Retail Monument Industry) recites that the industry covered normally employs but few employees (in one case only 1,500 in the entire country) and is not classified as a major industry; and there is no finding upon which any substantial effect upon interstate commerce could be predicated.

Examination of these codes puts it beyond dispute that the Recovery Act *has* been extended to trades and industries having only the most remote and fanciful connection with interstate commerce. These codes demonstrate beyond peradventure that the real theory of the Recovery Act is either that the Congress has authority to provide for the general welfare under the guise of the regulation of commerce, or that a desire to improve the spending power of wage earners in the nation generally with the hope thereby to increase the volume of all commerce including interstate commerce, is a sufficient ground for the Congress, in the exercise of its power "to regulate commerce * * * among the several states", to regulate the wages and hours of all wage earners, irrespective of the occupation in which employed.

3. The gravity of the issue thus presented.

No one can be insensible of the gravity of the issue thus raised. Certainly the present Administration is fully aware of it, as is evidenced by the care it has taken in selecting

the case in which to test the issue before this tribunal.[1] The briefest reflection convinces that if the theory is once accepted that the Constitution confers a power of undetermined extent to regulate anything and everything which

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[1]Although many opportunities have been afforded the Government to have the validity of the Recovery Act determined in this Court, it has yet to bring a case thereon to argument in this Court, and private individuals have been unable to do so either because the Administration has not seen fit to enforce orders of its various Boards or because of the Government's failure to effect review of adverse court decisions. In no less than 17 cases, the Recovery Act or its application has been declared unconstitutional during the past two years by United States District Courts from Florida to Idaho. *Purvis* v. *Bazemore*, 5 Fed. Supp. 230 (D. C. S. D., Fla., Dec. 2, 1933); *United States* v. *Suburban Motor Service Corp.*, 104 C. C. H., Par. 7103 (D. C. N. D., Ill., Feb. 10, 1934); *United States* v. *Lieto*, 6 Fed. Supp. 32 (D. C. N. D., Texas, Feb. 16, 1934); *United States* v. *Smith*, (D. C. E. D., Texas, Feb. 26, 1934); *Hart Coal Corp.* v. *Sparks*, 7 Fed. Supp. 16 (D. C. N. D., Ky., May 19, 1934); *United States* v. *Mills*, 7 Fed. Supp. 547 (D. C., Md., July 12, 1934); *United States* v. *Gearhart*, 7 Fed. Supp. 712 (D. C., Colo., Aug. 8, 1934); *United States* v. *Eason Oil Co.*, 8 Fed. Supp. 365 (D. C. W. D., Okla., Sept. 22, 1934); *United States* v. *Belcher*, 104 C. C. H., Par. 7247 (D. C. N. D., Ala., Oct. 31, 1934); *United States* v. *Kinnebrew Motor Co.*, 8 Fed. Supp. 535 (D. C. W. D., Okla., Nov. 12, 1934); *United States* v. *George*, 104 C. C. H., Par. 7298 (D. C. S. D., Fla., Jan. 19, 1935); *The Table Supply Stores, Inc.* v. *Hawking*, 104 C. C. H., Par. 7289 (D. C. S. D., Fla., Jan. 23, 1935); *United States* v. *Superior Products, Inc.*, 104 C. C. H., Par. 7300 (D. C., Idaho, Feb. 9, 1935); *United States* v. *Weirton Steel Co.*, 104 C. C. H., Par. 7308 (D. C., Del., Feb. 27, 1935); *United States* v. *National Garment Co.*, 104 C. C. H., Par. 7320 (D. C. E. D., Mo., March 9, 1935); *The Acme, Inc.* v. *Besson*, 104 C. C. H., Par. 7319 (D. C., N. J., Mar. 12, 1935).

In two of these cases, in addition to the present case, the United States has sought review in this Court, only to dismiss its appeal upon the eve of the argument. In one of these, *United States* v. *Smith*, argument was postponed over the term on motion of the Solicitor General made shortly before the cause was to be called for argument in this Court at the last term, and at the opening of the present term the Government dismissed its own appeal, 293 U. S. 633. The second case appealed to this Court by the Government has also been recently dismissed by it shortly before the case was to come on for oral argument. *United States* v. *Belcher*, 294 U. S.

"affects" interstate commerce, and that the question of such affectation is to be determined as a matter of economic fact in each particular case, then the Constitution has been amended by statute into a document which would never have been adopted or ratified originally, and—what is more serious—the whole theory upon which our system of government is founded and upon which it has been maintained is gone.

4. The power now claimed by the Government is not granted by the express language of the Commerce Clause; has never heretofore been claimed or exerted in our history; and the Constitution could not have been adopted or ratified had it been claimed originally.

The truth of these statements is patent and the point need not be labored. The power now asserted is not in terms granted by the Commerce Clause or by any other provision of the Federal Constitution. No instance exists in our history of the exertion of such a power by the Federal Government, nor is there any precedent, judicial or historical, to sustain its existence. The Administration's theory of constitutional construction, no less than this statute, rests upon nothing more solid than a supposed "change in social theory" (R. 150). Unless we are now to adopt the view that the Constitution may be amended by statute, the acceptance of such change by the people and their agreement in the extension of the powers of the Federal Government must be evidenced by a constitutional amendment. *Kansas* v. *Colorado*, 206 U. S. 46, 89, 90.

A single example is sufficient to show that the Commerce Clause was not deemed by the framers to have the meaning

now attributed to it, and could not have been included in the Constitution if it had. In the case at bar the Federal Government asserts its power under the Commerce Clause to regulate the wages, hours and working conditions of labor in the production of commodities, because such matters "affect" interstate commerce either in the same or in other commodities. That theory is the basis of the Recovery Act and the sole basis of the wage and hour counts in the indictment in the instant case. Had the Congress possessed any such power under the Commerce Clause in the early days of our history, a Northern majority in the Congress could have settled the slave question by a statute prohibiting or conditioning the movement of products of slave labor in interstate commerce (cf. *Hammer* v. *Dagenhart*, 247 U. S. 251); or, as in the case at bar, it could have directly regulated the wages and hours of slaves. It is no answer to suggest that we live in an era of different moral, social and economic views and conditions. The question of power is just the same; so, too, is the effect, actual or potential, of labor and labor earnings on interstate commerce.

If the Government's present view of the scope of the power granted to it by the Commerce Clause is correct, what need was there of the Thirteenth Amendment to abolish slavery? On the Government's theory, a temporary political majority in any Congress had from the outset of the Government the power at any time to make the ownership of slaves practically valueless. What need, moreover, was there for an Eighteenth Amendment to prohibit the manufacture and sale of intoxicating liquor? Certainly it cannot be denied that these "affect" interstate commerce in the sense in which the Government uses that term.

5. Under the construction of the Commerce Clause now advanced by the Government, the United States loses its character as "a government of laws, and not of men", and the doctrine of enumerated powers is gone.

Every schoolboy knows the distinctions between the character of the States and their powers and the character and powers of the United States and the historic reasons therefor. Having experienced the tyranny that comes of a central government of undefined power capable of arbitrary use, the States were fearful lest the Constitution should result merely in a change of masters,—not in a realization of the freedom so bitterly won. To that end no general grant of legislative power was given to the Federal Government and every specific grant of definite power was scrutinized with jealous eye before the Constitution was ratified. As appears from contemporaneous and authoritative documents quoted from in the margin,[1] the friends of the new

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[1] Madison, a member of the Federal Convention, a co-author of The Federalist and one well qualified to speak upon the subject, thus described the purposes of the Commerce Clause to the Virginia Convention during the debate upon the question of the adoption of the Federal Constitution (3 Elliot's Debates, pp. 259-260):

> "The powers of the general government relate to external objects, and are but few. But the powers in the states relate to those great objects which immediately concern the prosperity of the people. Let us observe, also, that the powers in the general government are those which will be exercised mostly in time of war, while those of the state governments will be exercised in time of peace. But I hope the time of war will be little, compared to that of peace. * * *
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> "All agree that the general government ought to have power for the regulation of commerce. I will venture to say that very great improvements, and very economical regulations, will be made. It will be a principal object to guard against smuggling, and such other attacks on the revenue as other nations are subject to. We are now obliged to defend against those lawless attempts; but, from the interfering regu-

Constitution "found it necessary to urge", as Chief Justice Marshall points out, that the United States was to be a government "of enumerated powers" (*McCulloch* v. *Maryland*,

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lations of different states, with little success. There are regulations in different states which are unfavorable to the inhabitants of other states, and which militate against the revenue. New York levies money from New Jersey by her imposts. In New Jersey, instead of co-operating with New York, the legislature favors violations on her regulations. This will not be the case when uniform regulations will be made."

And Hamilton pointed out that, since the United States was a government of enumerated powers only, no express reservation of the rights and liberties of the people was necessary, and might even be dangerous. Said he (The Federalist, No. LXXXIV):

> "But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the Nation, than to a Constitution which has the regulation of every species of personal and private concerns. If, therefore, the loud clamors against the plan of the Convention, on this score, are well founded, no epithets of reprobation will be too strong for the Constitution of this State. But the truth is, that both of them contain all which, in relation to their objects, is reasonably to be desired.
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> "I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. *For why declare that things shall not be done which there is no power to do?* * * *
>
> "There remains but one other view of this matter to conclude the point. The truth is, after all the declamation we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, a *Bill of Rights.*"

The adoption of the first ten amendments in the face of this clear exposition is an indication of the strongest kind of the grave fear of encroachment by the new government upon individual liberty and of the determination of the people that it should never occur.

Madison in No. XLV of The Federalist in reassuring the people that the new constitution would not prove fatal to the state governments stated:

> "The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are

4 Wheat. 316, at 405). It was on this understanding, and on this understanding alone, that the Constitution was adopted. "That principle is now universally admitted" (*McCulloch* v. *Maryland, supra*), and "it has become an accepted constitutional rule that this is a government of enumerated powers" (*Kansas* v. *Colorado*, 206 U. S. 46, 81). The new government was also to be "a government of laws, and not of men" (*Marbury* v. *Madison*, 1 Cranch. 137, 163).

No one will question that these were the fundamental principles upon which this Government was framed. Their existence is the only excuse for any written Constitution at all. With these fears and these principles in mind, the Constitution, at least in respect of the provisions granting power to the Federal Government, was written with a

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to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

"The operations of the Federal Government will be most extensive and important in times of war and danger; those of the State Governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State Governments will here enjoy another advantage over the Federal Government. The more adequate, indeed, the Federal powers may be rendered to the National defence, the less frequent will be those scenes of danger which might favor their ascendency over the Governments of the particular States.

"If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained".

studied definiteness and care which has been too frequently the subject of comment to need reiteration here. A grant of the indefinite power to regulate *all matters* "affecting" commerce among the several states would have been thoroughly out of keeping with the definiteness and precision of every other specific grant of power contained in the Constitution.[3] Yet that is how the Government would have us read the Commerce Clause now. The result would be an enumerated power of such indefinite extent and such general scope as to render futile the maintenance of any Constitution at all. Not only would this subvert the principle of a government of restricted and definitely enumerated powers but this record proves that it would result in a government of men and not of laws in a sense never sanctioned in our history.[3] It is true that in a highly complex society statutes cannot be too detailed, and men must take some chances that they read the law aright. *Nash* v. *United States*, 229 U. S. 373, 377. That is not to say, however, that a power specifically restricted to a particular subject shall be construed to extend to all matters which "affect" that subject, and the question of "affectation" then left to the determination of a jury. Yet that is just what has happened in this case.[4]

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[2]No less than four attempts in the Constitutional Convention of 1787 to confer a broad general welfare power upon the Congress as a specific grant of power were defeated (Farrand, Records of the Federal Convention, I, p. 229; II, pp. 25, 26, 367).

[3]In its administration through the Code System the Recovery Act has most certainly had this result, as pointed out previously herein in discussing delegation of legislative power.

[4]A result of acceptance of the government's theory would be to have the question of the extent of the government's power over intrastate business determined by the juries of the land. The government relied very largely upon opinion evidence of so-called expert witnesses, being economists and members of the poultry slaughtering business, on the question whether the business of the defendants "affects" in-

The inquiry as to the power of the State governments is wholly different, at least in so far as the Federal Constitution is concerned. They are invested with general legislative power over all subjects not expressly prohibited to them, and are limited only by general guaranties of liberty and due process. In the case of a government admittedly armed with broad general powers to legislate for the public welfare (*Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398), we may well expect to find that the liberty guaranteed by the Bill of Rights has a meaning which varies with the changing moral, social and economic conditions of the

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terstate commerce. The judge, without defining interstate commerce, and over the objection of the counsel for defendants, left the question whether the activities "affect" interstate commerce to the jury for determination (R. 1510, 1530, 1531, 1532) and there is no criticism of this in the opinion of the Circuit Court of Appeals. Not only did the court neglect to define interstate commerce, but with the possible exception of the court also, an incidental remark in its charge, left the impression that if defendants' acts *in any way* affected interstate commerce, such acts were within the power of Congress to prohibit under the code. The only remarks made by the court which might arguably be said to leave the impression that defendants' acts must substantially affect interstate commerce, in order to lie within Federal control were as follows (R. 1532):

> "The question is whether the violations, or any of them, affected interstate commerce in any of the ways alleged in the indictment. Of course, the violation must have been substantial and not merely incidental."

But the court in the same paragraph of its charge added the following qualifying remark to the statement just quoted:

> "although small, and however small a violation it is, if it is a violation of a provision and it affects interstate commerce, then that is what the act says shall not be done."

And in the next paragraph of its charge the court further delimits its only statement to the effect that defendants' acts must have substantially affected interstate commerce when it stated (R. 1533):

> "The law says that if those acts are done which it says shall not be done and which are acts which affect interstate commerce, then it is not the size of the act; it is the act in and of itself that is the violation. Do you understand me? Is that plain?"

times (*Nebbia* v. *People*, 291 U. S. 502, 537). But, for reasons which are obvious and have been stated above, the principles applied to the construction of constitutional restrictions upon State power can have no valid place in determining the scope of *grants of power* to the Federal Government—if the doctrine that it is a government of enumerated powers is to remain as "an accepted constitutional rule" (*Kansas* v. *Colorado*, *supra*).

8. Acceptance of the Government's view as to the extent of the Commerce Clause is inconsistent with the maintenance of our dual system of government.

It can scarcely be denied that if the Government's view of the scope of the Commerce Clause be accepted there is little human activity that is not potentially subject to regulation by the National Government. Matters heretofore considered as solely within the domain of the regulatory powers of the States, or as not subject to any governmental interference at all, will fall within the purview of the Federal power. This potentiality is self-evident. In the light of the exercises of power of the present Administration in the multitudinous codes promulgated under this statute, as hereinbefore detailed, it cannot be contended that the fear is fanciful. Nor is the abrogation of the Tenth Amendment the only danger. The very existence of the States is placed subject to the will of a majority in Congress. If the wages paid to labor in productive activity "affect" interstate commerce, certainly the taxes paid to the State in such productive activity have an equal effect upon that commerce. If the Federal Government can regulate the one, it can regulate the other. The taxes which are the lifeblood of the State are, therefore, on the logic of the Government's

theory, collected by the State only by the forebearance of the Federal Government.

7. If the Government's view as to the scope of the commerce power be accepted, the field of individual liberty heretofore regarded as secure from governmental encroachment in certain fundamental aspects will be greatly restricted and potentially subject to complete extinction.

It is settled that the "liberty" guaranteed by the Constitution is not confined to mere liberty of the person but includes, among other things, the right to enter into contracts for the purpose of enabling the citizen to carry on his business. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *United States* v. *Joint Traffic Association*, 171 U. S. 505, 572. It was the fear of undue encroachment by the Federal Government upon this liberty which, among other things, was responsible for the addition to the Constitution of the Bill of Rights contained in the first Ten Amendments.[1] The grants in the Constitution, including the commerce power, must be read in the light of this limitation. This is not to say that the commerce power, within its proper sphere, may be limited or excluded from operation by private contracts (*Addyston Pipe and Steel Co.* v. *United States*, 175 U. S. 211, 228, 229); nor is it to deny that in proper circumstances freedom of contract in the matter of hours and wages may be limited in the direct regulation of interstate

[1] The adoption of these express limitations upon the authority of a Government which had no general legislative authority is the strongest possible indication of the fear of the People of the possible encroachments of a central government upon individual liberty, and of their determination to make such encroachments impossible. See Hamilton, The Federalist No. LXXXIV.

commerce (*Wilson* v. *New*, 243 U. S. 332). But the Government's view of the commerce power would admit of regulation of all private transactions, including the fixing of prices and of wages and hours of labor in all activities of whatever character, provided only that they "affect" interstate commerce in some degree. Surely the facts that a continent was settled with a purpose of securing liberty, that a nation was established for that purpose, and that its organic law has from the outset contained an express guaranty of that liberty against governmental encroachment, have a bearing upon the construction of the grants of power to that government. Yet, on the government's view of the commerce power, that fundamental aspect of the liberty guaranteed vanishes whenever the activity of the citizen "affects" interstate commerce. What activity does not affect it?

8. While the exigencies of the present depression do not authorize the Congress to transgress the limits of its constitutional authority, adherence to the Constitution has not prevented measures of the broadest kind which are apt and efficacious for relief and recovery.

What has been said must make it plain that no such power as that assumed in the Recovery Act and the codes was ever conferred upon the National Government. The "emergency" brought about by the depression, so much stressed in the Government's argument, can make no difference on the issue of constitutional power and can have no effect upon the performance by this Court of its limited function under the Constitution. Early in its history this Court announced upon a famous occasion that:

> "No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its [the Constitution's] provisions can be suspended during any of the great exigencies of Government."[1]

And it has since consistently adhered to the view that emergency does not increase constitutional power, nor diminish constitutional restrictions.[2]

If the measures which the Federal Government properly may take within its conceded authority should prove insufficient for relief and recovery, the responsibility, the duty, and the authority to enlarge the scope of the power of that Government lies with the People who created it; limited its authority, and reserved the right to change it, not with the Court, whose duty is to apply the Constitution. The limited character of the Federal Government, the doctrine of the enumerated powers, the historical reasons for each, and, conclusively, the specific reservation of the power of the people contained in the Tenth Amendment, alike, compel this conclusion. The problem of duty and authority is not new. Emergencies are not novel. In the present case the scenery is new, but the issue is old—as old as the life of this Court. The solution is to be found in one form or another in every volume of its reports. A single example is sufficient. In *Kansas* v. *Colorado*, 206 U. S. 46, 90, speaking in answer to a contention by the Government basically the same as that now presented, this Court pointed out that the Government's plea had been foreseen by the People at the time of the framing of the Constitution and

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[1] *Ex parte Milligan*, 4 Wall. 2, 121.

[2] *Home Building & Loan Ass'n.* v. *Blaisdell*, 290 U. S. 398, 426; *Wilson* v. *New*, 243 U. S. 332, 348.

that they had then answered it forever in the negative by the Tenth Amendment. This Court said:

> "this amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. . . . The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated."

The wisdom of the fathers finds vindication in the conditions of today. While the validity and not the wisdom of the National Recovery Act is the point at issue in this case, it is not impertinent to note that the framers were not insensible of the fact that panaceas for industrial ills most frequently prove but Utopian dreams. The Recovery Act is based, as herein demonstrated, upon the theory that an increase in wage levels and a spread of work is the first essential step in the ending of the depression which has gripped the nation. This is but the prophecy of those temporarily in power in our national councils. Experience has demonstrated the vanity of that prophecy and the most reputable authorities in the field of economics now say that the plan of attempting to bring back prosperity by raising wage levels before price levels advance is a fallacy and

will not work out.* Wisely, the framers intended that it should never lie within the competency of the National Government to experiment with the liberties of the people in the pursuit of a nebulous ideal for the promotion of the public welfare.

While the dangerous, novel and clearly unconstitutional measures forced upon the nation by the statute under review have thus proven not only ineffective but positively detrimental in the opinion of those best qualified to judge, a host of other measures, appropriate to the occasion and within the conceded authority of the Congress, have been at hand and have been used lavishly for relief and recovery. Acting under its authority under clause 1 of Section 8 of Article I of the Constitution "to lay and collect

*The Brookings Institution has recently published (New York Herald Tribune, April 9, 1935, p. 2) the first independently organized investigation of the net effects of the Recovery Act. The report concludes that the Recovery Act has retarded recovery; that the rise in wages effected thereby has been counter balanced by an equal or greater rise in prices, that the internal readjustments resulting have been haphazard and unplanned; that funds which would otherwise have been available for capital expenditure have been diverted and that bank credit has not been expanded. The report suggests that the enlargement of spending sought to be created by the Recovery Act should have been sought by

> "(1) the removal of the deterrent to the free and prompt utilization of the existing money of the country, and (2) monetary expansion."

Three of the six experts who prepared the report hold or have held high positions in the National Recovery Administration, Mr. Leon C. Marshall being at the present time a member of the supervisory board which has been invested with the functions formerly exercised by General Johnson, Mr. Leverett C. Lyon, being a former Deputy Assistant Administrator and Mr. Paul T. Homan being economist. The other three experts have also occupied governmental positions, Mr. George Terborgh being with the Federal Reserve Board, Mr. Charles L. Dearing having written the highway section of the Coolidge Transportation Report and Mr. Lewis L. Lorwin having been an economic expert of the New York State Department of Labor.

Taxes * * * to provide for * * * general Welfare of the United States"[4], the Congress has:

> Appropriated $3,300,000,000 for various projects intended to provide employment and to aid the recovery of business (Title II of the National Industrial Recovery Act);
>
> Placed vast funds in the hands of the Reconstruction Finance Corporation (47 Stat. 5) for similar purposes;
>
> Created a Civilian Conservation Corps (48 Stats. 22) and appropriated large sums of money for the employment of the youth of the land in the conservation of our natural resources, and proposes now to expend further large sums for the same purpose;
>
> Within the past month, appropriated the unprecedented sum of $4,800,000,000 for work relief; and taken innumerable other actions for the preservation of the homes and savings of the people, the stimulation of business and the relief of the destitute.

These measures are familiar to all. In addition, acting under its bankruptcy power it has enacted measures of unprecedented scope for the relief of debtors, and acting under its authority to conduct our foreign affairs, it has held council with the great nations of the earth in respect of the common economic problems which concern the world.

In the face of these instances of the exercise of a vast authority, who will contend that adherence to the Constitution leaves the nation impotent to deal with the emergency?

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[4]This is not a "general welfare clause" in the common meaning of the term. It merely authorizes the collection of taxes with which to provide for the general welfare. See Madison, The Federalist, No. XLI; 1 Story, Commentaries, Secs. 908, 911.

II

THE MINIMUM WAGE AND MAXIMUM HOUR PROVISIONS OF THE CODE ARE BEYOND THE PURVIEW OF THE COMMERCE CLAUSE AND ARE IN CONTRAVENTION OF THE FIFTH AMENDMENT.

The Government has appealed from the decision of the Circuit Court of Appeals holding these provisions unconstitutional.

The provisions regulating hours and wages, for alleged violations of which defendants were convicted, must be sustained, if at all, as regulations, not of transactions "in interstate commerce", but as regulations of transactions or conduct "affecting" interstate commerce.

1. The scope of the power asserted, as evidenced by the maximum hour and minimum wage provisions of the Recovery Act and of the codes adopted thereunder, and the arguments advanced in support of the asserted power, together with the implications as to the extent of power arising therefrom.

It is not necessary to go to the codes for the purpose of finding an assertion of Federal authority over minimum wages and maximum hours. The Act requires that all employers in an industry covered by a code shall observe the "maximum hours of labor and minimum rates of pay * * * approved by the President" (Section 7(a)(3)). The Congress thus undertook affirmatively and directly through the President to regulate the wages and hours of persons subject to codes, established under the Act. The Act did not require the insertion of such provisions in every code. Its legislative history and the history of the times,

however, disclose that it was contemplated that all codes should contain minimum wage and maximum hour provisions, and that one of the chief purposes of the Act was to bring the regulation of all wages and hours within the control of the Federal Government. The hours and wages of labor thus sought to be brought within Federal control were not the hours and wages of the employees of persons or corporations engaged in interstate transportation, but the hours and wages of the employees of persons engaged in commerce and industry, and as administered (see preceding discussion), the hours and wages of employees of persons engaged neither in commerce nor industry, in the ordinary meaning of these words, but engaged in many other activities such as the rendering of personal service, etc.

The exercise of this power is not sought to be supported as a direct regulation of commerce but upon the theory that wages and hours "affect commerce". Nor is the power asserted confined to the regulation of hours and wages of employees themselves engaged in interstate commerce. It extends and was intended to extend to the regulation of the employees of persons engaged in production of goods from raw materials coming from outside the State, and of goods intended for subsequent movement in interstate commerce (from whatever source of origin the raw material may have come), of persons engaged in the subsequent local sale of such goods after production, and of persons engaged in other pursuits, having no relation whatsoever either to the production or distribution of goods.

That such is the scope of the power asserted appears not only from the Recovery Act itself and from its administration, but from the arguments hitherto advanced by the Government in kindred cases in support of the validity of code provisions regulating maximum hours and minimum

wages. Succinctly stated, the argument is that regulation of wages and hours is within the Commerce Clause because wages paid and hours worked affect:

(1) the price at which goods produced may be sold and the competitive relation of producers, and hence affect, in various ways described by the Government in considerable detail, the flow of interstate commerce; and

(2) the purchasing power of a large section of the population affected (a) directly, by the quantum of wage received by each wage earner, and (b) indirectly, by reducing unemployment through shortened hours, hence affecting the demand, and consequently the volume and flow of interstate commerce.[1]

The wages and hours of persons engaged in production are incidents of production and only indirectly affect the commerce which follows production.[2] Regulation of wages and hours is therefore regulation of persons engaged in the production of goods. As said in *Kidd* v. *Pearson*, 128

[1] These arguments in one form or another are repeated over and over again in the Government's brief in this case. It may be fairly stated that all, or substantially all, of the arguments submitted in support of Federal authority to regulate wages and hours are predicated upon one or the other of the hypotheses stated in the text. In respect of the second of the two hypotheses, viz.: stimulation of purchasing power, the Government frankly concedes in its brief that such was one of the prime purposes of the Recovery Act, to be accomplished through regulation of wages and hours, and that hence provisions regulating wages and hours have been inserted in all Codes, irrespective of the occupation of the persons affected thereby.

[2] In a later subdivision of this brief we shall endeavor to point out that regulation of production is not regulation of commerce, either state or interstate. We are concerned at this point only with the extent of the power asserted, the basis upon which it is sought to be supported and the resulting consequences upon both our political and economic institutions of the acceptance of the fundamental bases of the Government's argument.

U. S. 1, a construction of the Commerce Clause which would draw within its reach the regulation of production, would bring within it "not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry", for "there is not one of them that does not contemplate more or less clearly an interstate or foreign market." The Court in that case, therefore, recognized the conceded fact that production "affects" interstate commerce, but pointed to the logical consequences of extending the Commerce Clause by construction so as to include the power to regulate production.[8]

While wages only indirectly affect commerce in the ordinary sense, there are many other factors affecting the same much more directly, such as price fixing or price control, the control of production itself, the allocation of production as between States, communities and persons, and the geographical distribution of the goods produced. The logical consequence of the argument that the Congress may regulate wages because they affect interstate commerce is that it may regulate prices, and may control and allocate production and the distribution of the goods produced. That this is not a fanciful statement of the consequences attendant upon the Government's contentions in support of the provisions of codes adopted under the Recovery Act is evidenced by the brief of the Government itself in the *Belcher* case. At page 111 of that brief it is said:

> "* * * Congress might have attempted a solution through general price-fixing, but such a course

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[8]See also *United States* v. *Knight*, 156 U. S. 1, and *Heisler* v. *Thomas Colliery Company*, 260 U. S. 245.

> would have involved great practical difficulties and danger of abuse. * * *"[4]

At page 83 (speaking of the Lumber Code, to which that case related) the Government says:

> "* * * The subjects of greatest importance covered by the code, apart from the labor provisions, are production control, conservation, and price protection."

On the same page it says:

> "In order that a 'reasonable balance' between consumption and production may be maintained the Code Authority is empowered to make estimates every three months of expected consumption and to apportion the same (upon the basis of relative shipments during a representative past period) among the divisions and subdivisions of the industry. (Art. VIII, Appendix B, pp. 36-37.) Each division and subdivision agency is authorized, subject to the approval of the Code Authority, to adopt a formula for the assignment of production allotments to individual operators. (*Ibid.*)"

The Government has thus courageously recognized the logical consequences of the doctrine asserted, viz., that under the Commerce Clause the Congress may not only regulate wages and hours but may regulate prices, control

[4]Hasty examination of the preliminary draft of the Government's brief fails to reveal that it expressly includes the contention that the Federal Government may regulate the prices of commodities sold in interstate commerce. Since the argument made in its brief in this case, however, is, in part, that wages affect prices and that prices affect the flow and distribution of interstate commerce, it follows logically that, if the Federal Government may regulate wages, because they affect prices and prices affect interstate commerce, it may regulate prices. This is one-half of the Government's argument. The other half is that wages and hours affect purchasing power. But so do prices. So if the Government may regulate wages and hours because of their effect upon purchasing power, it may equally regulate prices for the same reason.

production and allocate the same to individuals, all for the purpose of bringing about, by the exertion of Federal authority, a " 'reasonable balance' between consumption and production".[5] During the depression we have heard much of "planned economy". The logical consequence of the Government's theory of the relation of the Commerce Clause to the codes is that the Congress may impose either a comprehensive scheme of "planned economy" upon the nation, or so much as it deems at the time expedient, reserving to itself the right to impose at a later time so much of the remainder as it deems necessary and proper.[6] Such is

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[5]The Government in its brief in this case does not refer to "production control", including the power to determine volume of goods to be produced and the allotment of production to individual operators, as among the beneficent effects of the Poultry Code as it did in the *Belcher* case in respect of the lumber code. This is probably because the lumber code operated upon producers of goods intended for shipment in interstate commerce, while the Poultry Code operates upon the producers of articles which have ceased to be in interstate commerce and are being prepared for local consumption. But these logical consequences of the extent of the power asserted follow from the fundamental basis of the argument made in this case as well as in the *Belcher* case, and this is not only recognized by the Government's brief but is put forward therein as illustrating the beneficent effect of the nationalization of all industry and the regimentation of the population under the benign guidance of a supreme bureaucratic Administration at Washington. All of this, of course, is to be accomplished under the Commerce Clause.

[6]We have no doubt but that the Congress, through a removal of the restrictions of the anti-trust laws, might, within reasonable limits, permit persons engaged in interstate commerce to enter into agreements limiting production, fixing prices, etc. Such an act, however, would be *permissive* in character and would merely restore to the interested parties the right to contract upon these subjects free from the restrictions of the Sherman Act. The Recovery Act is not a permissive statute. While it contemplates that the members of any industry shall, in the first instance, write the code, such code, when approved by the President of the United States, is made the law of the land, is imposed upon all members of the industry whether subscribers thereto or not, and a violation thereof is made a penal offense. Moreover, the President (Sec. 3d) is empowered of his own motion to impose a code upon any industry, whose members fail to submit one for approval.

the extent of the Federal power asserted by the Government itself in justification of the establishment of codes of regulations having the force of law, to be drawn from so much of its argument as is predicated upon its right to regulate persons engaged in the production of goods, whether by regulation of wages and hours or otherwise.

Nor is the power asserted confined to the regulation of persons engaged in the production of goods in interstate commerce, for as said in the brief in the *Belcher* case (at p. 82):

> "The effect of low wage rates and other terms of employment upon interstate prices * * * is not dependent upon whether the particular work was performed upon lumber which ultimately was shipped into the state."

The logical consequence of the doctrine asserted is that the power of the Congress reaches to the regulation of producers who do not ship in interstate commerce, but with whom producers shipping in interstate commerce are in competition. Moreover, hours and wages of persons employed by retailers affect interstate commerce. Consequently, if wages and hours of employees engaged in production may be brought within Federal control because "affecting interstate commerce", so, it would seem, may the wages and hours of employees of persons engaged in retail trade be brought within control of the Federal Government for the same reason. Those charged with the administration of the Act have so interpreted the power conferred by prescribing minimum wages and maximum hours of employees engaged in such trade, and the Act, we think, contemplated that they should.

Finally, insofar as the argument is addressed to the effect of wages and hours upon purchasing power, it ap-

plies equally to all wage earners, in whatever pursuit engaged. The arguments hitherto advanced by the Government in support of the wage and hour provisions of the Live Poultry Code thus disclose the extent of the asserted Federal authority under the Commerce Clause upon subjects hitherto regarded as beyond its scope.[7]

It may be properly said that the convictions below may not be set aside because under the Recovery Act Federal authority has sought to impose conditions upon industries not within the reach of Federal authority, if the industry of which the defendants were members was subject thereto. It may also be argued that if any of the provisions, for whose violation defendants were convicted, are themselves sustainable within the commerce clause, they may not be set aside because the Code contains other provisions not within the commerce power. With this we do not agree, since the Code was adopted as a whole and its several parts are mutually interdependent.[7] But the purpose of the foregoing review of the contentions of the Government is not to provide a means of escape for these defendants by questioning the validity of the action taken under the Recovery Act in respect of other industries or other persons. Its purpose is to set forth the fundamental basis of the arguments made by the Government in support of the validity of the Code provisions, regulating wages and hours, for alleged violations of which these defendants were convicted, and to state fairly and without exaggeration the effect of such arguments upon the division of powers as between State and Federal governments and upon the political and economic institutions of the nation developed under the Constitution as hitherto interpreted. The effects stated

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[7]See discussion *infra*, Part II, Point VII.

above are not only the logical consequence of the fundamental basis of the Government's argument, but are disclosed by the briefs of the Government in kindred cases to be recognized by it as such.

2. Production, whether by way of manufacture, mining, farming or any other activity, is not commerce and is not subject to regulation under the Commerce Clause. In so holding in previous cases this Court has been guided by the consideration that to hold otherwise would be destructive of our dual system of government and extend to the Federal Government the power to nationalize industry.

The defendants are engaged in the business of slaughtering and selling poultry.

The poultry slaughtered had ceased to be articles of interstate commerce at the time of its slaughter.[1] The defendants are primarily slaughterers. The function of the defendants is precisely the same as that of the operator of a packing house producing dressed meat, or of any other manufacturer engaged in transforming raw material of any description into a finished or semi-finished product for subsequent use or consumption. The wage and hour provisions of the Live Poultry Code thus undertake to regulate the conduct of manufacture by regulating the wages and hours of the manufacturer's employees. Since such is

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[1]Interstate commerce begins when an article is committed to a carrier for interstate transportation (*Coe* v. *Errol*, 116 U. S. 517), and ends when it arrives at its destination (*Brown* v. *Houston*, 114 U. S. 622). See also *Arkadelphia Co.* v. *St. Louis, Etc. Co.*, 249 U. S. 134; *Crescent Cotton Oil Company* v. *Mississippi*, 257 U. S. 129; and the very recent case of *Federal Compress & Warehouse Company* v. *McLane*, 291 U. S. 17.

the essential nature of the defendant's business, the question first presented is whether the Commerce Clause confers upon Congress power to regulate the conduct of manufacture, and particularly the wages and hours of employees in a manufacturing business.

The power conferred is the power "to regulate commerce among the several states and with foreign nations". Unless that which is regulated is commerce, it is not within the delegated power. Production, whether by way of manufacture, mining, farming or otherwise, is not commerce. The function of production is to prepare articles for subsequent use in commerce after which, but not until which, they may or may not be brought within the federal authority under the Commerce Clause according to the circumstances of the particular case.

"Commerce" was first defined by the Court in *Gibbons v. Ogden*, 9 Wheat. 1, 189. The sole question was whether navigation was included within the term "commerce". In determining this question, Chief Justice Marshall, speaking for the Court, found it necessary to define the word commerce itself, which he did in the following language:

> "The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is

> regulated by prescribing rules for carrying on that intercourse."

Under this classic definition, subsequently reiterated by the courts on many occasions, "commerce" is "intercourse" embracing traffic, buying and selling, the interchange of commodities, and navigation. Such definition, however, necessarily excludes manufacture or other productive processes, the purpose and effect of which is to prepare articles in their raw state for the commerce in the finished product which is to follow.

The modern definition of commerce as contained in The Century Dictionary and Encyclopedia is as follows:

> "1. Interchange of goods, merchandise, or property of any kind; trade; traffic; used more especially of trade on a large scale, carried on by transportation of merchandise between different countries, or between different parts of the same country, distinguished as *foreign commerce* and *internal commerce*; as, the *commerce* between Great Britain and the United States; or between New York and Boston; to be engaged in *commerce*."

Under this definition, as well as under the judicial definition of the word as employed in the Constitution, production or manufacture is not commerce, but something that precedes it, or, as related to the raw materials transformed by manufacture, follows it.[9]

[9] As stated by the Chief Justice in *Gibbons* v. *Ogden*, *supra*, the words of the Constitution should be construed in "their natural and obvious import" (p. 188). The word "commerce", construed in its natural and obvious import, excludes production. In the same opinion the commerce power was defined as a power to prescribe "rules for carrying on * * * interstate commerce." This also excludes the prescription of rules for carrying on production, which is not intercourse.

This Court has upon a number of occasions held that production is not commerce and not within the power of Congress to regulate.

In *Kidd* v. *Pearson*, 128 U. S. 1, it was contended that a statute of Iowa, prohibiting the manufacture of intoxicating liquors and construed by the highest court of that State as prohibiting such manufacture for purpose of interstate transportation, as well as of local consumption, violated the Commerce Clause. The precise question presented was the extent to which the police powers of the State were limited by such clause. The Court approached this question, however, not from the standpoint of the limits of state power but from the standpoint of the limits of the Federal power under the Commerce Clause.

That such was its method of approach is evidenced by the following excerpt from its opinion (at p. 20):

> "We think the construction contended for by plaintiff in error would extend the words of the grant to Congress, in the Constitution, beyond their obvious import, and is inconsistent with its objects and scope. The language of the grant is, 'Congress shall have power to regulate commerce with foreign nations and among the several States', etc. These words are used without any veiled or obscure signification. 'As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they have said'. *Gibbons* v. *Ogden, supra*, at page 188."

It held that the Commerce Clause did not empower the Congress to regulate the production of articles intended

for shipment in interstate commerce and that consequently the State Act was not in contravention of that clause.

The reasons for the conclusion thus expressed were thus stated (at pp. 20-21):

> "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term, as given by this court in *County of Mobile* v. *Kimball*, 102 U. S. 691, 702, is as follows: 'Commerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities'. If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liver-

> pool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are and must be, local in all the details of their successful management.
>
> "It is not necessary to enlarge on, but only to suggest the impracticability of such a scheme, when we regard the multitudinous affairs involved, and the almost infinite variety of their minute details."[a]

In *United States* v. *Knight Company*, 156 U. S. 1, the Court again distinguished between production and commerce, saying (at p. 12)

> "commerce succeeds to manufacture and is not a part of it."

In this case, as in *Kidd* v. *Pearson*, *supra*, the Court remarked (at p. 16) that if regulation of commerce extended to the regulation of "productive industries whose ultimate result may affect internal commerce, there would be but little of business operations and affairs that would be left for state control."

In the first *Coronado* case (*United Mine Workers* v. *Coronado Coal Company*; 259 U. S. 344), this Court set aside a treble damage verdict upon the ground that the evidence failed to show an intent and purpose upon the

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[a] This decision was foreshadowed by the decision in *McCready* v. *Virginia*, 94 U. S. 391, in which the Court held that a Virginia statute regulating the planting of oysters in a navigable stream was not in conflict with the Commerce Clause, saying (p. 396):

> "There is here no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade."

part of the conspirators to restrain, prevent or obstruct interstate commerce. It appeared that the strikers, charged with conspiracy under the Sherman Act, had by their acts, including acts of violence, caused the plaintiff's mine to be shut down and thus had prevented the mining of coal. It also appeared that the product of the mine was shipped largely in interstate commerce. The effect of their acts, therefore, was to prevent or obstruct interstate commerce by preventing production. The Court held that this was not enough, saying (at pp. 407-408):

> "Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In *Hammer* v. *Dagenhart*, 247 U. S. 251, 272, we said: 'The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439.' Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce."

In *Heisler* v. *Thomas Colliery Company*, 260 U. S. 245, the Court observed that a conception of the Commerce Clause which would bring within it the regulation of production

> "would nationalize all industries, it would nationalize and withdraw from State jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other

> States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof', wool yet unshorn, and coal yet unmined, because they are, in varying percentages destined for and surely to be exported to States other than those of their production". (at pp. 259 260).

Consequently, the Court, as in the first *Coronado* case, held that a conspiracy the purpose of which was to prevent production, thus affecting interstate commerce but without intent or purpose directly to prevent shipments in interstate commerce, was not within the purview of the Sherman Act.

See also *United Leather Workers* v. *Herkert*, 265 U. S. 457, and *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 178 179.

In the second *Coronado* case, the Court held that, upon a retrial, evidence of the necessary intent and purpose to prevent the movement of coal in interstate commerce had been supplied and that hence the acts of the conspirators, of whatever character and wherever undertaken, were within the Act. Far from overruling the doctrine that production is not commerce it restated the rule laid down in the first *Coronado* case, citing in support of it the first *Coronado* case itself and other cases.

In *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, the Court again distinguished between production and commerce saying "commerce does not begin until manufacture is finished" (p. 184), and quoting its statement in *United States* v. *Knight*, *supra*, that "commerce succeeds to manufacture and is not a part of it".

In *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U. S. 210, an Oklahoma statute prohibiting the production of oil except in accordance with regulations imposed by the State was held not to be in violation

of the Commerce Clause. The effect of the State regulation in this case was to limit and restrict the volume of oil produced and, hence, the volume capable of movement in interstate commerce.

See also *Chassaniol* v. *Greenwood*, 291 U. S. 584, in which the Court said (at p. 587):

> "Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. * * *"

The decision in *Hammer* v. *Dagenhart*, 247 U. S. 251, in which the Court held that, under the guise of regulating interstate commerce, Congress could not regulate the production of goods by closing the channels of interstate commerce to goods produced by child labor, is but the logical application of the distinction between production and commerce made in cases which both preceded and followed. Even the dissenting justices in that case recognized (p. 277) that Congress could not directly "meddle" with production by establishment of regulations governing it and dissented only upon the ground that the Act was sustainable as the exercise of the power of Congress to determine what might move in interstate commerce, its effect upon production being only indirect.

Reading these cases together from *Kidd* v. *Pearson* to *Utah Power & Light Company* v. *Pfost* and *Chassaniol* v. *Greenwood*, two things are plain: first, that the Court applying the rule laid down by Chief Justice Marshall in *Gibbons* v. *Ogden*, has construed the word "commerce" in its natural import and hence as excluding the existence in the Federal Government of a power to regulate production;

second, that in so doing, it was not concerned with the meaning of words alone or employing a legalistic approach, but was guided primarily by the consideration that, so to construe the Commerce Clause as to draw within it power to regulate production or the activities of producers in their capacity as such, would be destructive of our dual system of government and place it within the power of Congress to nationalize industry.[4]

Regulation of hours and wages is a regulation of production, not of commerce, and beyond the power of Congress.[5] The Government would bring such regulation with-

[4]A number of cases referred to in this section of the brief are cases involving the limits of the States' police power or the power to tax. The Government in its brief would brush all these cases aside upon the ground that the permissible limits of the State power in these respects do not "necessarily" mark the limits of the Federal power. No one will dispute this proposition. The difficulty with the argument is twofold: it ignores (1) the fact that the permissible limits of State power in these respects *may* also mark the permissible limits of Federal power; and (2) that in the cases we have cited, such as *Kidd* v. *Pearson*, and others, the Court, as stated in the text, arrived at its determination of the permissible limits of State authority by first defining the permissible limits of Federal authority and held that the authority sought to be exercised by the State was not in violation of the Commerce Clause because in a field exclusively committed to the States and withheld from any grant to the Federal Government.

[5]The Government in its brief weakly suggests that the fact that the Government has never hitherto sought to regulate production or hours and wages, and that it was hitherto supposed to be without such power, are without significance. In support of this it comments upon the fact that the power of Congress over interstate transportation was not exercised for a long time and then only gradually. But the subject-matter being regulated in the two cases is, of course, entirely different. In the one case it is a subject-matter clearly within the Commerce Clause. In the other, the subject-matter of the regulation is not only outside the express power granted, construed in the light of the natural and ordinary import of the words employed, but outside the scope of such power as commonly understood by all, including this Court, throughout the whole course of our constitutional history, and would involve the extension of Federal power to activities never dreamed of by those who framed the Constitution or by the people who adopted it.

in the Commerce Clause because wages and hours "affect" interstate commerce. They would thus substitute for the words of the grant a broader grant. Whatever the limitations of the words "affecting interstate commerce" may be, it admits of little doubt that if the framers had undertaken to confer this power upon the Federal Government, the Constitution would not have been ratified by the constitutional convention, and it admits of no doubt that it would never have been ratified by the people.

3. Prior decisions of this court contain no warrant for the existence of the power asserted, but on the contrary clearly indicate that it is wanting.

The Government cites prior decisions of this court as affording support for its view that the Commerce Clause grants authority to the Federal Government to regulate the wages and hours of labor of persons engaged in the purely local activities of the production or sale of goods because such hours and wages "affect" interstate commerce in two ways:

(1) By affecting prices and the competitive relations of producers; and

(2) By affecting purchasing power.

An examination of the decisions of this Court in the fields referred to, both those decisions cited by the Government and others, not only fails to afford any support for the Government's theory, but clearly shows an express negative of the existence of any power in the Federal Government to regulate the wages and hours of persons engaged in the production and sale of goods.

(a) THE CASES SUSTAINING FEDERAL ACTS PROHIBITING THE MOVEMENT OF CERTAIN ARTICLES IN INTERSTATE COMMERCE ARE NOT IN POINT.

Neither the Recovery Act nor the labor and wage provisions of the Live Poultry Code are in the nature of a prohibition against the movement of any articles in interstate commerce. They represent, on the contrary, an attempt upon the part of Congress directly to regulate production and as such constitute neither the regulation of commerce nor the exercise of any other power entrusted to the Federal Government.

Moreover, were the Act in form, or were it regarded in substance, an act prohibiting the movement of articles produced under conditions other than those prescribed by the maximum hour and minimum wage provisions of the Code, the case would be clearly distinguishable from those in which prohibitions against the movement of various articles in interstate commerce have been sustained. In every such case the purpose of the Act has been to prohibit the movement in interstate commerce of noxious articles in themselves harmful,[1] of persons or property the use of which gave rise to social evils of general recognition,[2] or which would induce the commission of crimes contrary to state law, in which case the purpose of the Act was to supplement the criminal statutes of the states themselves by

[1] The exclusion of diseased livestock (*Thornton* v. *United States*, 271 U. S. 414; *Reid* v. *Colorado*, 187 U. S. 137), and of adulterated foodstuffs (*Hipolite Egg Company* v. *U. S.*, 220 U. S. 45).

[2] The White Slave Act (*Hoke* v. *U. S.*, 227 U. S. 308; *Caminetti* v. *U. S.*, 242 U. S. 470); lottery tickets (*Champion* v. *Ames*, 188 U. S. 321).

preventing the movement in interstate commerce of the subject matter of the crimes committed.[a]

There is, of course, no analogy between these acts and acts prohibiting the transportation in interstate commerce of useful articles of commerce, themselves harmless whether considered from the standpoint of their physical characteristics or of the results of their intended use. Were this a prohibitory statute, instead of a statute purporting directly to regulate the conduct of production, it could be sustained only upon the theory that Congress, under the guise of regulating interstate commerce, may impose upon all persons in the United States those economic and social concepts which may constitute the view prevalent in Congress at the time of their adoption and arrogate to the Federal Government the control of the processes of production as well as the regulation of interstate commerce. This Congress may not do.

(b). The Railroad Cases.

The most obvious example of the commerce power is the power to regulate interstate transportation and its instrumentalities. It is also in this field that the exercise of the power has been most greatly extended, with the largest consequent limitation upon powers theretofore exercised by the states.

This is due to the nature of the subject matter regulated. Interstate transportation is the most familiar example of

[a] Transportation in interstate commerce of stolen automobiles (*Brooks* v. *U. S.*, 267 U. S. 432) and the various acts enacted by Congress in aid of state laws against the use of communication of intoxicating liquors (*Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U. S. 311; *United States* v. *Hill*, 248 U. S. 420).

interstate commerce. Its regulation is a matter specifically committed to Congress by the Commerce Clause. To render such regulation effective it is essential (1) that state control, when inconsistent with the exercise of this specially conferred power, must yield to that of the Federal Government, and (2) that for purposes of effective regulation Congress may, where conditions require, interfere with state activities. But in either event the subject matter of the regulation is commerce—transportation—and not activities which either precede or follow commerce, such as production or sale, although both affect transportation, its volume and distribution.

Consequently, for the purpose of removing burdens upon or preventing interference with interstate commerce and its effective regulation by Federal authority, such authority, may require state rates to be so adjusted as not to discriminate against interstate commerce (the *Shreveport* case, *Houston & Texas Ry.* v. *United States*, 234 U. S. 342), or impose undue burdens thereon (*Railroad Comm. of Wisconsin* v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563) and may authorize the abandonment of lines located wholly within a single state, the continued operation of which constitutes such a burden (*Colorado* v. *United States*, 271 U. S. 153). But the power exercised in the *Shreveport* case did not extend to the power to regulate the production of goods in Texas, or the conditions under which produced or the wages and hours to be observed in their production, for the purpose of insuring "fair competition" between Texas merchants and producers on the one hand and those in Louisana on the other hand. The *Shreveport* case was a regulation of transportation and had for its basis the right of the Federal Government to prevent the State of Texas from fastening upon the rail-

roads rates which would operate to the disadvantage of persons located in Shreveport in the commerce in which both the parties and the railroad were engaged.

Under the commerce power, as applied to railroads, the Congress may also regulate instrumentalities and activities of interstate commerce where so commingled with state commerce as to be incapable of separate regulation, as in the cases of Uniform Safety Appliance Laws—cars moving in state and interstate commerce being moved together in the same train—, regulation of security issues of railroads, etc. Similarly, the Act prohibiting the issuance of fraudulent bills of lading was sustained by the Court as the regulation of an instrumentality of interstate commerce, as it was (*United States* v. *Ferger*, 250 U. S. 199).

It must therefore be borne in mind at all times that the subject matter of all laws regulating the operation of railroads, whether indirectly affecting intrastate commerce or not, is the regulation of interstate commerce in the narrowest sense, *i.e.*, the regulation of interstate transportation.

But even in this field the decisions of this Court establish that the power of the Congress does not extend to interference with state control over purely intrastate activities, constituting no burden upon or interference with the interstate transportation operations of an interstate carrier, and does not authorize Congress to regulate either the conduct or liabilities of the carriers in such respects (see the *First and Second Employers Liability Act Cases* (207 U. S. 463 and 223 U. S. 1), and *N. Y., N. H. & H. R. R. Co.* v. *Bezue*, 284 U. S. 415).[1]

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[1]Had the decision in the *First Employers' Liability* case been different, it would not have been helpful to the Government. Its subject-matter was the regulation of interstate transportation or of the liabilities of persons engaged therein, growing out of the com-

The Commodities Clause case (*United States* v. *Delaware & Hudson Co.*, 213 U. S. 366) is not an exception. On the contrary, it supports the contentions hereinbefore made. The Act in question prohibited a carrier from transporting goods which it had produced or in which it had an interest. The Government contended that the law should be literally construed. As so construed it prevented a railroad company from ~~producing~~ carrying coal which it had mined. The court, invoking the rule that a construction should be avoided which would give rise to serious constitutional questions, limited the act to the transportation of coal or any other commodity in which the carrier at the time of its transportation had an interest. The basis for this limitation was that, construed otherwise, it might be regarded as an attempted regulation of production, *i.e.*, of mining. It found the purpose of the act to be to regulate the transportation operations of the carrier for the purpose of preventing it from obtaining an undue preference over other shippers of the same commodity compelled to pay full tariff rates, while the true transportation cost to a carrier-owner in competition therewith would be represented by the bare cost of carriage, citing in support of this interpretation of the act its previous decision in *New Haven R. R.* v. *Interstate Com. Comm.*, 200 U. S. 361.

It is unimportant to consider whether under the present state of the law, governing the extent of the Congressional

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mingling of interstate and intrastate transportation. The line of demarcation between the permissible exercise of the authority of the Federal Government over interstate carriers and that which is not permissible is necessarily fine, since almost anything that affects such a carrier affects interstate transportation. The extension of the power of Congress to regulate production and the wages and hours of labor in private industry is something entirely different. It is neither the regulation of interstate commerce nor of an instrumentality thereof.

power over companies engaged in interstate transportation, the act would be now so interpreted or not. It may well be that, despite the resulting indirect effect upon production, the literal prohibition of the act would be sustainable as a regulation of an instrumentality of interstate commerce in respect of matters having a direct bearing upon such transportation and only an indirect effect upon production. In any event it is no authority for the contention now made.

The Government cites *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, for what purpose is not apparent. In that case the Court sustained the validity of an act regulating to a very limited extent the relations between interstate carriers and their employees. The decision is wholly predicated upon the power of Congress to regulate such carriers. It affords no support for the proposition that under the Commerce Clause the Federal Government may regulate the hours and wages of the employees of persons engaged in production whether by way of manufacture or otherwise, or, for that matter, of employees of persons engaged in interstate commerce.

The Government refers to certain language in the case to the effect that Congress may enact laws for the purpose of fostering and encouraging interstate commerce. Similar expressions are to be found in other cases concerning the regulation of interstate carriers and interstate transportation in harmony with the policy of Congress expressed in the Transportation Act to provide for an adequate system of interstate transportation. If the Government means that the commerce clause empowers Congress to to pass any act deemed by it wise or expedient for the purpose of fostering and encouraging interstate commerce, including acts regulating production and the hours and wages of persons en-

gaged therein, then the commerce clause is made the equivalent of a general welfare clause conferring upon Congress the power to pass any act designed to promote the general welfare and prosperity of the people of the United States. The Court in the *T. & N. O.* case and other cases relating to the regulation of interstate transportation and interstate carriers was not, of course, giving any such broad interpretation to the commerce clause.

Predicated upon the *T. & O.* case and *Wilson* v. *New*, 243 U. S. 332 (hereinafter discussed in detail in subdivision 6 of this Point), the Government contends that the power to regulate wages and hours of persons engaged in productive activities may be supported as a measure designed to prevent strikes. Indeed, the argument apparently goes to the extent of asserting that Congress may regulate the hours and wages of all workers for such purpose in order to prevent the effect of strikes not only upon movements of interstate commerce but upon the interruption of demand, etc. This, like substantially all other arguments of the Government, is but a specious and thinly disguised assertion that under the commerce clause Congress may regulate wages and hours of persons not only engaged in productive enterprises but in any other pursuits because strikes interrupt the orderly flow of commerce and the maintenance of a stable purchasing power upon the part of the population.

(c) The Anti-Trust Cases.

The purpose of the anti-trust act is to prevent contracts, combinations or conspiracies in restraint of interstate commerce. It thus operates directly upon interstate commerce and only indirectly upon intrastate activities which may be

affected by the prohibition of such contracts, combinations or conspiracies. That the constitutional theory upon which it is based is not one which accords to the federal government the right to regulate production is evidenced by the *Knight* case, when read in connection with the subsequent decisions of the court. In that case it was held, as hereinbefore pointed out, that production is not commerce but precedes it. Consequently, it was held that a combination among producers was not in violation of the anti-trust laws. Thereafter, in the *Oil* and *Tobacco* cases (*Standard Oil Co. v. United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106) the Court held that since such combinations, when resulting in monopoly or undue restraint of interstate commerce, were within the prohibitions of the Sherman Act, although indirectly affecting production. In this the court was obviously right. Otherwise Congress under its power to regulate interstate commerce would be powerless to prevent at their source contracts, combinations or conspiracies, the intent and purpose of which was to monopolize or restrain the same. Although qualified to this extent, the court, however, has repeatedly in the cases hereinbefore cited, adhered to its ruling that production is not commerce but precedes it and, hence, is in itself beyond the reach of the commerce power.

The line of demarcation between the constitutional authority of Congress over production on the one hand and commerce on the other and the limits of its power to affect either the former, or activities carried on within a single state, under the guise of protecting interstate commerce is likewise disclosed by the conspiracy cases which have arisen under the anti-trust laws. These cases are two kinds: conspiracies upon the part of members of labor unions, and conspiracies upon the part of buyers or sellers of

goods. Where the conspiracy is between sellers of goods in interstate commerce, the resulting restraint thereon is plain and the right of the federal government to prevent the same equally clear.

Where the conspiracy is between members of labor unions involved in a labor dispute, the line of demarcation is made equally plain by the cases. The established rule is that such conspiracies are beyond the reach of federal authority unless the intent and purpose of the conspiracy is to restrain or prevent the movement of interstate commerce as such (*Coronado Co. v. U. M. Workers*, 268 U. S. 295). Where this intent is wanting the conspiracy is beyond the reach of federal authority, although the effect of the same may be to prevent or impede the movement of goods in interstate commerce by preventing or impeding the production of goods intended for interstate sale and transportation (*Coronado Co. v. U. M. Workers, supra, United Leather Workers v. Herkert*, 265 U. S. 457; *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103). In each of these cases, held to be beyond the reach of federal authority, the argument was that the acts complained of, although local and without specific intent and purpose to impede or prevent the movement of interstate commerce, had such effect. The court has consistently refused to recognize this doctrine. In all such cases there was not only lack of intent (declared by the court to be a necessary element) but the effect upon interstate commerce, although substantial, was indirect, the acts complained of being leveled directly at production and not commerce.

In those cases on the other hand, where the necessary element of intent was present, the effect and intended effect upon interstate commerce was direct and not indirect. (See cases, *supra*.)

In *Industrial Assn. of San Francisco v. United States*, 268 U. S. 64, the same rule was applied to the activities of an employers' association seeking to insure the maintenance of an open shop by preventing the use of materials except under permit. That the agreement of the association constituted a combination or conspiracy in restraint of trade admits of no doubt, since all the necessary elements of agreement and confederation were present (*Hindsrup v. Pathe Exchange*, 264 U. S. 391). The question was whether the restraint operated upon interstate or intrastate commerce. It appeared that the conspiracy affected the volume of goods moving into the state in interstate commerce. The purpose of the conspiracy, however, was not to prevent or curtail such movement, but to control activities within the state, *i.e.*, the erection of buildings and the performance of other work through the maintenance of an open shop. The court held that the conspiracy was not within the reach of federal authority because of the absence of an intent and purpose to prevent, curtail or affect the movement of interstate commerce, the effect thereon being incidental and not direct.

These cases, therefore, clearly mark the limits of federal authority. Where the intent and purpose of the conspirators or of the confederators is to prevent and restrain interstate commerce and their acts operate directly thereon, they are within the reach of federal authority. Where, however, the intent and purpose is to restrain or control local activities, such conspirators and confederators are not within the reach of federal authority, although the indirect effect of their acts may be to affect interstate commerce.

Similarly, combinations of buyers having for their purpose the restraint or interference with the free flow of interstate commerce, are within the reach of federal author-

ity, although the activities of such buyers may be confined to the limits of a single state because constituting an intended restraint upon interstate commerce directly affecting the same (*Local 167* v. *United States*, 291 U. S. 293).[1] On the other hand, it has never been supposed that local retailers, acting independently, could not fix prices for their own wares, however high or low, although it is obvious that the prices charged by them would affect the volume of

[1] The Government for some reason places great reliance upon this case. In its brief the Government seeks to convey the impression, if it does not make the direct statement, that in this case there was lacking that element of intent to restrain or burden interstate commerce, in the absence of which the court had hitherto declined to enjoin conspiracies charged to be contrary to the Anti Trust laws. The opinion of the court itself shows that the element of intent was present. As stated in the opening of the opinion it was an appeal from an injunction "against a conspiracy * * * to restrain and monopolize interstate commerce" (p. 294). At page 297 the court says:

> "Appellants' contention that there is no proof that they intended to restrain or did interfere with interstate commerce has no merit.
>
> The evidence shows that they and other defendants conspired to burden the free movement of live poultry into the metropolitan area."

On the same page it said that the various acts of the defendants therein recited operated "substantially and directly to restrain and burden the untrammeled shipment and movement of the poultry while unquestionably it *is* in interstate commerce."

All conspiracy cases are essentially border line cases, the determination of which depends upon the particular facts of each case. In this case the court found the elements of intent, direct interference and substantial and direct burden and restraint. Moreover, as in the other cases reviewed, all of the acts of the defendants were in commerce, *i.e.*, they consisted of activities pursued in connection with the buying and selling of articles of commerce, which the court found were carried on in that case while such articles were still "in" interstate commerce. The suggestion that this case lends any support to the contention that the Federal Government under the guise of regulating interstate commerce may regulate production and hours and wages of persons engaged therein is beyond comprehension.

interstate commerce through the effect of the price charged upon probable sale and consumption.

Moreover, it should be borne in mind at all times that in all of these conspiracy cases arising under the interstate commerce act the direct subject matter sought to be regulated or controlled was commerce, *i.e.*, in the case of buyers' combinations the interchange or sale of goods, and in the case of labor disputes the prevention of interstate transportation. Where the effect of the acts complained of were leveled solely at production or productive processes, the federal government has been held to be without authority to restrain such acts even though affecting, as interference with production must always affect, actual or potential transportation in interstate commerce.

The Federal Trade Commission cases are akin to the anti-trust cases. The Federal Trade Commission Act has been denominated one of the anti-trust acts. The only power conferred upon the Federal Trade Commission in respect of trade practices is to prevent the pursuit of unfair methods of competition in interstate commerce[3] by orders to cease and desist therefrom. In every case in which it has exercised this power the commission has made a finding that the respondent was guilty of the use of unfair methods of competition in interstate commerce and its order has been confined as to an order to cease and desist therefrom. Indeed the act itself requires such a finding as a predicate for the order. Such an order may affect the intrastate activities of

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[3]The Recovery Act on the other hand provides simply for codes of "fair competition." There is much talk in the Government's Brief about the alleged violation of the minimum wage and maximum hour provisions of the Live Poultry Code by defendants being "unfair competition," but no one could suggest that such alleged violation was unfair competition in interstate commerce, or, indeed, intrastate commerce.

the respondent as well, but this effect is incidental and indirect. Moreover, in these cases again it is commerce that is being regulated, *i.e.*, trade practices in the exchange and sale of goods, not the production thereof.

The only other power which the Federal Trade Commission has is that to enforce Section 7 of the Clayton Act prohibiting the acquisition by one company engaged in interstate commerce of the stock of a company with which it is in competition where the effect of same is substantially to lessen competition. The power of the Commission to enforce this section (*Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554) rests upon the same principle as does the Sherman Act, *i.e.*, the prevention of monopoly or restraint in interstate commerce through the elimination of competition. Its exercise may indirectly affect intrastate activities or even the production of goods, but it is neither a regulation of such activities or of production. If, however, Congress should undertake to confer upon the Federal Trade Commission authority to require a manufacturer to run his plant at half capacity in order to improve the competitive condition of a competitor, such an act, under all conceptions of the commerce power heretofore entertained, would be clearly invalid as an assumed regulation of production and not of commerce, however beneficial such an act or order might be in bringing about a more equitable distribution of production and distribution.

(d) The Swift, Stafford, Olsen and Tagg cases.

The Government in various places in its brief refers to the four cases named, which may be properly considered together.

Swift and Company v. *United States*, 196 U. S. 375, was a case arising under the Sherman Act. It appeared that the principal beef packers of the country, who constituted a dominant proportion of the packers and dealers in fresh meat throughout the United States, had entered into a combination not to bid against each other at livestock markets in the purchase of livestock and to commit other acts having the intent and effect of monopolizing commerce among the states. This combination was declared to be an illegal combination in restraint of trade. The *Swift* case is but an example of the familiar exercise of the power of Congress under the Commerce Clause to prevent monopoly and undue restraint in interstate commerce, although many of the acts enjoined were committed within the borders of a single state. Indeed, it may be said in passing that in any anti-trust case the acts complained of must, of necessity, be acts the *locale* of which is a single state, although the intent and purpose is to restrain and monopolize interstate commerce.

Stafford v. *Wallace*, 258 U. S. 495, involved the constitutionality of the "Packers and Stockyards Act of 1921" in so far as it provided for the supervision by Federal authority of the business of the commission men and livestock dealers in the great stockyards of the country. The passage of this act was the direct outgrowth of the *Swift* case and had for its purpose making the decree therein more effective (p. 520). The act was passed after careful investigation and the submission of a report by the Federal Trade Commission. As appears from the statement of the case, the packers, whose combination was enjoined in the *Swift* case, had come into possession of the stockyards constituting both the receiving depots for the movement of livestock in interstate commerce and the markets at which

it was sold. As also appears therefrom, the Commission found that these packers controlled such markets and held "a whiphand over the commission men who act as the intermediaries in the sale of livestock." In the course of its opinion, the Court observed:

> "If Congress could provide for punishment or restraint of such conspiracies after their formation through the Anti-Trust Law as in the *Swift Case*, certainly it may provide regulation to prevent their formation. * * *"

It appeared from the investigation preceding the passage of the act, as recited in the statement of the case, that only a small proportion of the livestock moving in or out of the stockyards was shipped to or from the state in which such yards were located. It also appeared from the investigation preceding the adoption of the act, as recited in the statement of the case (p. 502), that the shippers of livestock complained that the practices of the commission men and dealers worked to their prejudice through the suppression of competition, monopoly of prices, imposition of excessive charges and the pursuit of other practices leading to monopoly. It was for the purpose of arresting these practices restraining interstate trade and tending to monopoly that the act was passed providing for the supervision by Federal authority of the business of such commission men and dealers. That act, like the Sherman Act, therefore, had for its primary purpose the prevention of monopoly or unreasonable restraint of interstate commerce. There appeared, in the investigation preceding the passage of the act, ample factual foundation for the enactment of a statute having such purpose. The act was sustained as a regulation of the business of persons whose activities were so directly related to and so directly affected the movement of a constant

stream of commerce as to bring the act within the Commerce Clause.

The purpose of the act thus sustained was primarily to prevent restraint and monopoly in interstate commerce through the regulation of the practices of persons directly connected therewith. Moreover, it should be observed that in that case, as in all others where the Federal power has been sustained, it was commerce that was being regulated, *i.e.*, trading in the articles composing the same, which in that case were found to be articles of interstate commerce moving in continuous stream into and out of the yards where the persons regulated conducted their business. There is certainly nothing in that case that supports the contention that Congress may regulate conditions under which goods are produced.

Chicago Board of Trade v. *Olsen*, 262 U. S. 1, involved the constitutionality of the Grain Futures Act, the purpose of which was to prevent obstructions and burdens upon interstate commerce in grain by regulating transactions on grain future exchanges. As in the act sustained in the *Stafford* case, prevention of undue restraint and monopoly was the purpose of the act under review. It is, of course, proper for Congress under the Commerce Clause to take any measures appropriate to this end. As in the *Stafford* case, the Court also found that there was a constant flow of interstate commerce through the great grain markets which came to rest only temporarily in such markets. It accepted the finding of Congress that the practices pursued in transactions in grain futures had the effect of restraining and obstructing the free flow of such commerce. The act was sustained solely upon the theory that it was competent for Congress to provide for the regulation of such restraint and obstruction. It is significant that in the

course of the opinion which, like the opinion in the *Stafford* case, was predicated in part upon the *Swift* case, the Court characterized that case as one in which it had "refused to permit local incidents of great interstate movement, which, taken alone, were intrastate, to characterize the movement as such". But in all three of these cases these local incidents were incidents of commerce, not of production or manufacture preceding commerce. Moreover, in both the *Stafford* and *Olsen* cases the decisions were based upon findings that the practices in question burdened and restrained the free flow of interstate commerce, operated directly thereon, the arrestment at the markets of the articles moving therein being merely temporary. This Court itself in subsequent cases has had occasion to refer to the extraordinary basis of the decision in these cases in such a way as to render them inapplicable to any ordinary situation.[1]

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[1] In distinguishing these cases in *United Leather Workers* v. *Herkert*, 265 U. S. 457 the Court said:

> "The cases of *Stafford* v. *Wallace*, 258 U. S. 495, and *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, are also supposed in some way to sustain the view that a strike against the manufacture of commodities intended to be shipped in interstate commerce is a conspiracy against that commerce. What those cases decided was that when Congress found from investigation that more or less constant abusive practices and a course of business, usually only within state police cognizance, threatened to obstruct or unduly to burden the freedom of interstate commerce, it could by law institute supervision of such course of business in order to prevent the abuses having such effect * * *" (p. 649).

And in *Atlantic Coast Line Railroad Company* v. *Standard Oil Company*, 275 U. S. 257:

> "Reliance is put on *Stafford* v. *Wallace*, 258 U. S. 495, to sustain the claim that this transportation of plaintiff's oil in Florida is interstate commerce. In that case the question under consideration was the validity of the Packers and Stockyards Act of Congress of 1921, chap. 64, 42 Stat. at L. 159, U. S. C. title 7, § 182, providing for the supervision by Federal authority of the business of the commission men

Tagg Bros. & Moorehead v. *United States*, 280 U. S. 420, like *Stafford* v. *Wallace*, arose under the Packers and Stockyards Act. It involved the validity of an order of the Secretary of Agriculture fixing the charges of commission men at the Omaha stockyards, described as market agencies. It appears from the opinion that all such agencies were members of the Omaha Livestock Exchange, whose members had a monopoly of acting as such market agencies. They conceded that they were subject to Federal regulation under the doctrine of the *Stafford* and *Olsen* cases. The opinion discusses the constitutional questions arising under the due process clause only (pp. 430-439).

It is believed that the *Stafford* and *Olsen* cases mark the extreme limit of the power of Congress under the Commerce Clause to enact regulations affecting intrastate activities.

In any event, they afford no support for the Government's position in the case at bar. They may be briefly and clearly distinguished:

(1) As the Government in its argument clearly recognizes, they are predicated upon the existence of a constant stream of interstate commerce coming

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and of the live stock dealers in the great stockyards of the country, and it was held that for the purpose of protecting interstate commerce from the power of the packers to fix arbitrary prices for live stock and meat through their monopoly of its purchase, preparation in meat, and sales, Congress had power to regulate the business done in the stockyards, although there was a good deal of it which was, strictly speaking, only intrastate commerce. It was held that a reasonable fear upon the part of Congress, that acts usually affecting only intrastate commerce when occurring alone, would probably and more or less constantly be performed in aid of conspiracies against interstate commerce, or constitute a direct and undue obstruction and restraint of it, would serve to bring such acts within lawful Federal statutory restraint" (p. 272).

See also, *First Coronado Case*, 259 U. S. 344; *Minnesota* v. *Blasius*, 290 U. S. 1.

to rest at a market place only temporarily and continuing thereafter in interstate commerce. In the instant case there is no such stream. As previously demonstrated herein, interstate commerce ceased at least when the chickens reach the slaughterhouses of these defendants, if not at the railroad terminals. Every sale of chickens with which these defendants are charged and every sale proved in the record was a sale to a retail dealer in Brooklyn, New York, in the same state, city and borough in which defendants' slaughterhouses are located. There was no proof that any slaughterer in the metropolitan area in and about New York ever sold a single chicken intended for an interstate destination or which ever moved to an interstate destination.

(2) In the *Stafford* and *Olsen* cases the flow of interstate commerce was obstructed by the constant repetition of practices giving rise to monopolistic tendencies or at least to the manipulation of markets, thus disrupting the flow. There is no evidence whatever in this case that the activities of these defendants tended to monopoly or to the manipulation of markets. No combination between slaughterers is charged or involved (except "a conspiracy" to refuse to obey the unconstitutional Recovery Act). The alleged effect of the wages paid by defendant upon interstate prices is clearly negatived by the Government's proof that the interstate price is fixed upon the basis of the market quotations at the terminals at which time the defendants and other slaughterers have not acquired the chickens and the wages they pay have not entered into the wholesale price fixed.

(3) Moreover, there is nothing in the *Stafford* and *Olsen* cases inferring the existence of Federal power under the Commerce Clause to regulate the wages and hours of labor of persons engaged in

productive enterprises, either in the production of goods in the raw state or in their transformation into finished or semi-finished products for further consumption and use in the commerce which follows such transformation." The practices involved in the *Stafford* and *Olsen* cases were not only found to be a restraint and burden upon interstate commerce but to affect the same directly. It was commerce that was being regulated. Wages and hours affect commerce only indirectly in the effect which they have upon the ability of the manufacturer paying the same to find a market for his goods. As clearly appears from the decision in the *Olsen* case, the practices therein involved were "the incidents" of commerce. Wages and hours in manufacture are not "incidents of commerce" but incidents of production.

4. The argument that regulation of wages and hours may be sustained because of the necessity for uniformity in all the states finds no support in the Constitution, and the conception of Federal power upon which it rests has already been rejected by this Court.

The Constitution established a dual system of government under which certain powers were delegated to the United States, all others remaining with the States. Each within its field was to be supreme. Moreover, the power of the Congress, whenever exercised in its field, is exclusive and excludes regulation of the same subject matter by the States. To the extent, therefore, that the Congress under the Commerce Clause may regulate industry or the conduct

[*] The halting of commodities for transformation by processing or manufacture is inconsistent with the theory of the *Stafford* and *Olsen* cases, *i.e.*, of a flow of commerce into and out of a market place with only temporary pause.

of persons engaged either in the manufacture or sale of goods, the power of the State to regulate the same vanishes.

The Government argues that to deny to the Congress the power to control price cutting and wage cutting in manufacturing within the several states will have the anomalous result that neither the nation nor the states will have any authority to take effective action to remedy a nation wide evil which must be dealt with by measures of national scope, for no single state can regulate wages and hours in its manufactories unless all do, for the products of regulated states will be driven out of trade by the competition of price cutters in unregulated states.[8] It is urged that the Constitution could never have intended such a result; and that the power to regulate commerce should be here construed as conferring power adequate to insure uniformity of wages and hours in the same industry in all the states.

As said by Chief Justice Marshall in *M'Culloch* v. *State of Maryland*, 4 Wheat. 316, 405:

> "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

In *Kansas* v. *Colorado*, 206 U. S. 46, the Court said (at pp. 81-82):

> "By reason of the fact that there is no general grant of legislative power it has become an accepted con-

[8] This argument of the Government assumes, of course, that the several states have the power to fix minimum wages and maximum hours of those engaged in private production,—a most shaky assumption (see discussion in subdivision 6 of this Point).

> stitutional rule that this is a government of enumerated powers."

And after referring to the statements of Chief Justice Marshall in *M'Culloch* v. *Maryland*, *supra*, the Court added:

> "* * * no independent and unmentioned power passes to the National Government or can rightfully be exercised by the Congress" (p. 88).

In *M'Culloch* v. *Maryland* the Chief Justice said (at p. 423):

> "* * * should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land."

The power to bring about uniformity of conditions or costs of production, through regulation of wages and hours or by any other means, is not within the enumerated powers. The power delegated by the Commerce Clause, from which such power is sought to be implied, is delegated in very simple language capable of understanding by the most humble. The words employed admit of the existence of no such implied power nor of any such interpretation. To give to it such an interpretation would be subversive of our dual system of government, as already pointed out.

Moreover, the theory upon which this argument is advanced, viz., that the Federal Government must be possessed of power to act in any situation where States acting separately cannot meet the situation, was made and rejected

in *Kansas* v. *Colorado, supra.* The contention of the Government, an intervenor in that case, was that it was possessed of the power to control waters of the Arkansas River to the exclusion of either of the contending States.[4] The Court answered the contention as follows:

> "His argument runs substantially along this line: All legislative power must be vested in either the state or the National Government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in

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[4] In that case Kansas brought an original action in this Court to restrain Colorado and certain Colorado corporations from diverting water of the Arkansas River for the irrigation of lands in Colorado especially preventing the natural and customary flow of the river into and through Kansas. The United States intervened, claiming a right to control the waters of the river to aid in the reclamation of arid lands, but not asserting that the diversion of the water by the states tended to diminish navagability of the river. The intervening petition of the United States was dismissed, the Court ruling that the Constitution has given to the United States no authority or duty to legislate for the reclamation of arid lands, and that its power to regulate commerce among the several states authorized it in respect of rivers within states to prevent or remove any obstructions to navigability, but no more. The Government rested its argument,

> "upon its alleged duty of legislating for the reclamation of arid lands; alleges that in or near the Arkansas River, as it runs through Kansas and Colorado, are large tracts of those lands; that the National Government is itself the owner of many thousands of acres; that it has the right to make such legislative provision as in its judgment is needful for the reclamation of all these arid lands and for that purpose to appropriate the accessible waters" (pp. 86, 87).

The Court answered that it was very settled doctrine that the United States was a government of limited and enumerated powers and it found no power given to the Congress by the Constitution to legislate with respect to the reclamation of arid lands.

the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. *This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act.* It reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the people.' Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, 'we the people of the United States,' not the people of one State, but the people of all the States, and Article X reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are

> not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning" (pp. 89 91).
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> "One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none" (p. 97).

The doctrine that the Constitution leaves no twilight zone was thus affirmatively laid to rest. The Court was unmindful of the attempts of President Theodore Roosevelt to establish the principles of constitutional construction embodied in what was then termed "New Nationalism". It condemned them in *Kansas* v. *Colorado*, and the subsequent efforts of that President to secure a Constitutional amendment giving general police powers to the Federal Government to legislate for the general welfare failed. That movement failed just as four attempts in the Constitutional Convention of 1787, to confer upon the Congress a power "to legislate in all cases for the general interests

of the Union, and also in those to which the States are severally incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation," were all defeated. (Farrand Records of the Federal Convention of 1787, I, p. 229; II, pp. 25, 26, 307).

An examination of the briefs before the United States in *Kansas* v. *Colorado* fully establishes that the basic contention which the Government is really making in the present case was there fully presented and defeated. In that brief the Government contended in terms that "to satisfy the increasing demand in this country for food, clothing and shelter it is apparent that sooner or later resort must be had to the possibilities of arid lands, and it is also apparent that these lands can be depended upon to supply such demand only when brought under cultivation, and they would be brought under cultivation only by means of irrigation" (Brief, p. 72). The Government further contended that under the doctrine of riparian rights in western streams held in the several States it would never be possible to provide for the irrigation and cultivation of the arid lands and that the public lands many of which were owned by the United States "cannot be reclaimed" nor could the policy of the United States with respect thereto be carried out unless the United States be accorded authority to deal with the whole situation through the control of the source of irrigation and that the State doctrines with respect to water rights would defeat the policy of the United States with regard to its arid lands. The answer of this Court was that that was not a matter with respect to which the Congress was entitled to have any policy.

5. In the final analysis the contention made rests upon a non-existent power in the Federal Government to enact any act deemed by it necessary or desirable to promote the general welfare.

The Committee Reports in the House, as well as the statements in the hearings before the Committees in both Houses, demonstrate that the proponents of the bill which became the Recovery Act relied in part upon the "General Welfare Clause of the Constitution" as affording a constitutional basis for the statute.[5]

It is well settled that the preamble of the Constitution, which contains a general welfare clause, does not confer upon the Congress any powers in addition to those granted in the Constitution itself. *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174; Story, 1 Commentaries 462; 1 Willoughby on Constitution 37.

It is also clear that the General Welfare Clause in the first paragraph of Section 8 of Article I merely empowers the United States to levy taxes with which to provide for the general welfare, and is not a "general welfare" grant in the ordinary sense of that term. The contrary argument recently made at this bar in one of the Gold Clause cases (*The Missouri Pacific* case) was not accepted. See also The Federalist, No. XLI; Story, 1 Commentaries 907; 1 Willoughby on Constitution 61.

Hitherto in cases of this description the Government has not specifically relied upon the General Welfare Clause.

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[5]House Report No. 59, May 23, 1933; Hearings before the House Committee on Ways and Means, May 18-20, 1933, p. 116; Hearings before the Senate Finance Committee, May 22, June 1, 1933, p. 419.

That the Committee relied thereon is, however, significant. Moreover, the broad extent of the power resulting from construing the Commerce Clause as though it conferred the power to regulate "anything affecting (or substantially affecting) interstate commerce" makes it plain that, even though the Government may not rely upon the general welfare clauses, it has given to the Commerce Clause an interpretation, under which it becomes in effect a grant of power to enact any statute deemed to promote the general welfare of the nation at least in so far as commerce, trade, industries and activities affecting commerce or trade are concerned. But, as is apparent from the previous discussion, the Commerce Clause was not intended to confer a general welfare power, the attempted insertion of which in the Constitution was four times defeated in the Convention (*Corwin, ubi supra*). If it had been, it admits of little doubt that the Constitution would have been adopted by the Convention and of no doubt that it would have been rejected by the people.

It is also apparent from the previous discussion, that any argument based upon construing the Constitution in the light of changed economic conditions (see *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 442) is without validity. We are not dealing with a government of general legislative authority but with one of defined and enumerated powers. Here we have a clause defining that power whose meaning is fixed by the words of the grant itself, by contemporary history, and by the whole history of this nation since the adoption of the Constitution. Although under peculiar conditions and to a limited extent the Commerce Clause has become, as it was intended to be, an instrument whereby federal authority may be exerted over local activities for the purpose of preventing burdens or re-

straints upon or obstructions to interstate commerce, it has never been construed so as to permit regulation by Congress of everything which may "affect" interstate commerce and thus draw within the authority of the Federal Government; complete control over industry and of all activities carried on within the states "affecting commerce" either before interstate commerce is begun or after it is ended. To give it such a construction is subversive of the very principles of the grant and of the dual system of government established by the Constitution.

6. The wage and hour provisions of the Code are in violation of the Fifth Amendment.

The unconstitutionality of the wage and hour provisions of the Live Poultry Code is emphasized when considered from the standpoint of the application of the Fifth Amendment. An elaborate discussion of the cases is unnecessary to establish that the "due process" clause in said Amendment prohibits the arbitrary and capricious exercise of an admitted power and enactments having no real and substantial relation to the objects embraced within the source of Federal power upon which predicated.[1] If such provisions of the Code be considered as legislation, they are plainly arbitrary and capricious legislation bearing no real and substantial relation to the power conferred upon the Government to "regulate commerce * * * among the several States," upon which they must be based.

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[1] *Blodgett* v. *Holden*, 275 U. S. 142, 147; *Untermyer* v. *Anderson*, 276 U. S. 440, 445; *Heiner* v. *Donnan*, 285 U. S. 312, 330; *Nebbia* v. *New York*, 291 U. S. 502, 525; *Adair* v. *United States*, 208 U. S. 161, 180.

Even if such provisions were limited in their application to persons engaged exclusively in the interstate shipment of poultry, there would be grave doubt as to their constitutionality. All of the contracts made by people engaged in interstate commerce are not such commerce, nor do they have a substantial relation thereto. The wage contract of a person engaged therein is certainly not such commerce, and *prima facie* has no substantial relation thereto, but concerns merely the private relation of employer and employee (Cf. *Adair* v. *United States*, 208 U. S. 161, 178; *Wilson* v. *New*, 243 U. S. 332, 347; *Adkins* v. *Children's Hospital*, 261 U. S. 525). In all business, whether interstate or intrastate, freedom of contract is the general rule (*Adair* v. *United States*, *supra*, pp. 172 175; *Coppage* v. *Kansas*, 236 U. S. 1, 14; *Adkins* v. *Children's Hospital*, *supra*, at p. 554; *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, 534; *Nebbia* v. *New York*, *supra*, at p. 523). This all pervading consideration would, in and of itself, create an almost conclusive presumption (Cf. *Coppage* v. *Kansas*, *supra*, at p. 14) against the inclusion of wage contracts of persons engaged exclusively in interstate shipment of poultry within the power to regulate commerce among the several states. As stated by this Court in 1931, per Mr. Justice Hughes, in *Near* v. *Minnesota*, 283 U. S. 697, 707-708:

> "The limits of * * * sovereign power must always be determined with appropriate regard to the particular subject of its exercise. * * * while liberty of contract is not an absolute right, * * * this Court has held that the power of the State stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured, *notably with respect to the fixing of prices and wages.* * * *" (Italics ours.)

There is nothing to rebut such presumption. Interstate shipment of poultry is purely private business. There has been no legislative investigation, no legislative finding, that it is clothed or affected with a public interest, or requires any kind of regulation in the public interest. Nor has there been any legislative finding showing any peculiar necessity for fixation of minimum wages in said business, by virtue of any substantial relationship between such wages and interstate commerce in its products or otherwise.[2] Nor, as previously pointed out, has there been any such investigation or any such finding by the President, or any administrator to whom he has delegated authority, or anyone else.[3] There is a bare determination by Congress that minimum wages *may* be fixed in *any* business the President sees fit to codify.

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[2]Compare the long investigation by the Federal Trade Commission preceding, and the findings of fact by Congress in, the Packers and Stockyards Act sustained in *Stafford* v. *Wallace*, *supra*, showing the substantial relationship between the practices regulated and interstate commerce in cattle; the similar findings in the Grain Futures Act sustained in *Board of Trade* v. *Olsen*, *supra*, showing the relationship between the practices regulated and interstate commerce in grain; and the exhaustive legislative investigation preceding, and the findings of fact contained in, the New York Milk Law sustained in *Nebbia* v. *New York*, *supra*, showing the peculiar necessity for regulation of milk prices in a "paramount industry".

[3]Any such finding, either by the legislature or by an administrator, though evidencing the views thereof, would not, of course, be controlling on this Court (*Wolff Packing Company* v. *Industrial Court*, *supra*, at pp. 536, 542.) This is particularly true of findings by administrators, as is evidenced by the decision of this Court in the *Wolff* case, where, in holding unconstitutional the regulation attempted, the Court assigned the following reason, among others, for its action (at p. 542):

> "Whether such danger exists has not been determined by the legislature, but is determined under the law by a subordinate agency, and on its findings and prophecy, owners and employers are to be deprived of freedom of contract and workers of a most important element of their freedom of labor."

Wage regulation has been upheld by this Court in only one instance (*Wilson* v. *New*, 243 U. S. 332)[4], and then only with respect to employees of common carriers engaged in interstate transportation,—a public business,—when it appeared that such regulation was for a temporary period and was made necessary by a dispute which threatened to interrupt and completely disrupt all interstate transportation by such carriers. This Court has since characterized the legislative excursion in that instance as one going to the "border line" of the law (*Wolff Co.* v. *Industrial Court*, *supra*, at p. 544). In any event, in order to

[4]The Government seems to suggest that *Tagg Bros.* v. *United States*, 280 U. S. 420, and *O'Gorman & Young* v. *Hartford Fire Insurance Company*, 280 U. S. 251, involved wage regulation, but this was plainly not the case. In the case first cited, regulation was permitted of the rates charged by *brokers* engaged in the business of buying or selling live stock in interstate commerce. Such brokers, who operated in the stockyards and rented space therein at a monthly rental for the purpose of storing cattle, in addition to incurring other expenses in connection with their businesses, had a virtual monopoly and had previously eliminated rate competition among themselves. They were thus engaged in a business affected with the public interest, under the test of *Nebbia* v. *New York*, *supra*, and the purpose of the regulation was to prevent their service charges from becoming an undue burden upon, and an obstruction to, the interstate commerce flowing through the stockyards. This Court pointed out that there was "no attempt to fix anyone's wages" (at p. 439). In the second case, the New Jersey statute provided that the commissions paid to its agents by a foreign insurance company should be "reasonable" and uniform. Under the decisions of this Court insurance is a business affected with a public interest and subject to regulation as to premium rates. The regulation in question was upheld against attack by an insurance broker because agents' commissions, being a percentage of premiums, bear a direct relation to the rate charged, constitute a vital element in the rate structure affecting its adequacy and the stability of the insurer, and, if not uniform, open the door to rebating to, and unfair discrimination among, policy holders. This is a far cry from regulation of the minimum wages of employees in private business, to which none of such considerations apply, and wherein, in addition, the value of employees depends, among other things, on the character and quality of the services performed and not only on the aggregate amount of business done in standardized form.

justify wage regulation under such decision, the Government must show not only (1) that the persons whose wages are regulated are engaged in interstate commerce; but (2) that the business in which they are engaged is one clothed with a public interest within the test laid down by this Court; and (3) that there exists a peculiar necessity, having a real and substantial relation to unobstructed interstate commerce in such business, for regulation of wages therein.[48]

As stated by Chief Justice Taft, in *Wolff Co.* v. *Industrial Court*, *supra*, with respect to State regulation, which, of course, need not be predicated upon a showing of a real and substantial connection with interstate commerce, but only with the legitimate objectives of the police power:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. * * *" (At p. 537).
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> "To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system

[48]Of course, if the Government had met all these requirements, the remaining question as to whether the particular wage scales prescribed were arbitrary or unreasonable would be one upon which the person attacking the same would have the burden of proof (*O'Gorman & Young, Inc.* v. *Hartford Fire Insurance Co.*, *supra*). The rule of that case as to the burden of proof, obviously has no application in the determination of questions of the existence of legislative power over a particular subject.

> may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. * * *" (at p. 539)

The same doctrine is reiterated in *Nebbia* v. *New York*, *supra*, where it is stated (at p. 525) that "a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts." Hence, in that case the first inquiry was "as to the occasion for the legislation and its history" (at p. 515). Since it appeared that the legislature, after a thorough and painstaking investigation, had found not only (1) that "the production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people", (p. 517) but, also, (2) that the industry was ridden with evils endangering the adequacy of the milk supply, the public health and the public welfare, which, owing to peculiar and uncontrollable factors, could not be expected to right themselves through the forces of supply and demand, but only through price regulation, (p. 518), the regulation in question was sustained.

But it is plain, not only from the Court's affirmative reiteration of the applicable rule, but from its entire approach, that that case supports no blanket attempt, even by

a State, possessed of broad police power, to regulate the wages of employees in all private business, without regard to the conditions in any particular business, without legislative investigation thereof, and without legislative determination, based on supporting findings of fact, of the necessity for the regulation of wages therein in the public interest. Much less does it support any such blanket attempt by the Federal Government.

The inevitable conclusion that the Federal Government possesses no such power was reached in *Adkins* v. *Children's Hospital, supra.* There attempt was made to interfere with liberty of contract by fixing minimum wages for women and children in all occupations in the District of Columbia, wherein the power of the Federal Government over commerce, production and all activities, is as broad, if not broader, than its power to regulate commerce among the several States, and such attempt was held by this Court to be arbitrary and capricious and to bear no reasonable or substantial relation to the objects embraced in the grant of power.

Far more arbitrary is the attempt in the instant case. Infinitely more remote and less substantial is the relation between the regulation attempted and the objects embraced in the grant of power relied upon. If fixation of minimum wages of those engaged in commerce in the District of Columbia is not a regulation of such commerce, infinitely less is a fixation of minimum wages of those engaged in private intrastate production a regulation of commerce among the several states.

If the Government's contention be sustained, it is a mockery to suggest that freedom of contract in private business is the rule, and limitation thereof the exception. The Government, in attempting to fix minimum wages of

those engaged in private intrastate production is not only attempting regulation bearing no reasonable or substantial relation to the object embraced in the interstate commerce grant, for the reason that that which is regulated is not interstate commerce, or, indeed, commerce at all, but is attempting to treat *all* such intrastate businesses as super public utilities, subject to the most extreme regulation, without even a legislative or administrative determination that *any* of such businesses is affected with a public interest or requires *any* kind of regulation in the public interest, or that there is any peculiar necessity for fixation of minimum wages in any such business, by virtue of any substantial relationship between such wages and unobstructed interstate commerce in the products of such business or otherwise. In a single jump are taken the hurdles that the activities regulated are not in interstate commerce, that they are not commerce at all, that they are not affected with a public interest, and that there have been no legislative findings either of a substantial relationship between interstate commerce in the products of any of the industries sought to be regulated and the wages paid therein, or of a necessity for the regulation of such wages predicated upon such relationship. The Government's contention is in essence that it may regulate every aspect of *all* private business, howsoever, by whomsoever, and wheresoever conducted, because there is some relationship between all such business and interstate commerce in general.

The price paid for the services of wage earners engaged in production has no greater connection with interstate commerce than the price paid for materials or machinery or money used in production. If the government may usurp the power to regulate the price paid for labor, it may usurp

the power to regulate the price paid for machinery, productive materials and money used in intrastate production. If the Government may regulate the wage level in intrastate production, on the ground that to do so increases national purchasing power and therefore increases consumption of goods shipped over state lines, so may it regulate prices to be paid for material and machinery and for money used in such production, since national purchasing power is likewise increased by payment of not less than fixed minimum prices therefor. If it is unfair competition, subject to Federal regulation, for one whose products eventually cross state borders, or who produces finished products from materials which have crossed state borders, or who produces articles similar to those of others which cross state borders, to pay for labor less than a specified amount, arbitrarily determined, so is it unfair competition for one to pay less than a specified amount for materials purchased, for machinery employed, and for money used in connection with such production. And this is only the beginning of the cycle, as is perfectly evident without elaboration. The end is price fixing of the articles produced (*Cf.* Live Poultry Code, Art. V, Sec. 9; *Darweger* v. *Staats*, New York Court of Appeals, April 2d, 1935) and absurdly arbitrary and detailed regulation such as that embodied in the "straight killing" provisions of the Poultry Code.

The arguments advanced by the Government herein are not novel. As has already been demonstrated, some of them were rejected over fifty years ago in *Kidd* v. *Pearson*, *supra*, to refer back to only one instance. Others have been rejected and held invalid more recently. In attempting to support the minimum wage law for women and children in the District of Columbia which came before the Court in *Adkins*

v. *Children's Hospital, supra*, it was argued (at p. 532) that such law was "a reasonable means of preventing cut-throat and unfair competition between manufacturers". That contention was rejected, although the employer in question was much more directly within the sphere of Federal regulation than the defendants herein. And in considering the Government's contention herein that the wage and hour provisions in question may be sustained on the ground that they are measures to increase purchasing power and to relieve unemployment generally, it is interesting to note that a much milder contention (namely, that the District of Columbia minimum wage law was justified because it constituted a measure to assure a decent, healthful standard of living to the particular individual employed) was rejected by the Court in the *Adkins* case, *supra*, in the following language (at pp. 557-558):

> "To the extent that the sum fixed exceeds the fair value of the services rendered, it [the minimum wage law] amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole."

So here, the attempt is to shift arbitrarily to the individual employer the burden of supporting indigent or partially indigent individuals, the burden of supporting whom, if it falls on anyone, falls on society as a whole. And here, as there, the feature of the legislation which "perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a

purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do" (p. 558).

As the arguments advanced herein have been uniformly rejected in the past, so must they be rejected now. If they are not, the entire conception of this Government, the warp and woof of its fabric, are changed.

Thus far we have dealt with wages. But a word in addition is necessary with respect to hours. The Recovery Act does not involve an attempt to regulate the hours of individuals engaged in interstate shipment of poultry for the purpose of protecting their health. It involves an attempt to regulate the hours of virtually all individuals, in whatsoever industry employed, and wherever situated, and such attempt is predicated not on any desire to improve their health, as required by the decisions of this Court (*Lochner* v. *New York*, 198 U. S. 45[5]; *Adkins* v. *Children's Hospital, supra*, at p. 554), but apparently on the theory of "work sharing". Every regulation of hours, State or Federal, that has ever come before this Court and been sustained, has been sustained on the ground that such regulation was one bottomed on the power of the State to protect the health of its citizens engaged in intrastate activities[6], or of the Federal Government to promote the health and safety

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[5]Although this case has been distinguished, "the principles therein stated have never been disapproved" (*Adkins* v. *Children's Hospital, supra*, p. 550).

[6]*Bunting* v. *Oregon*, 243 U. S. 426 (ten hour day for anyone employed in a mill, factory or manufacturing establishment sustained); *Holden* v. *Hardy*, 169 U. S. 366 (eight hour day for miners sustained). For cases involving regulation of hours of labor of women and related matters see *Muller* v. *Oregon*, 208 U. S. 412; *Riley* v. *Massachusetts*, 232 U. S. 671; *Hawley* v. *Walker*, 232 U. S. 718; *Miller* v. *Wilson*, 236 U. S. 373; *Bosley* v. *McLaughlin*, 236 U. S. 385, *Radice* v. *New York*, 264 U. S. 292.

of employees and passengers on interstate carriers[1]. Here the regulation is an arbitrary attempt by the Federal Government to interfere with private intrastate business. It has no reasonable or substantial relation to the object embraced in the grant of regulating commerce among the several States, or the health or safety of the persons engaged therein, but is inextricably tied to a futile assertion of the power to regulate wages in all business for the purpose of carrying out the Administration's economic theories.

The issues in this case are, therefore, plain. They are: (1) May the Federal Government usurp the power of regulating purely intrastate production? (2) In attempting to do so, may it annihilate the principles of a free government, by wiping out in a single stroke the freedom of contract and enterprise of a free people and regimenting those participating in every private business by regulation more onerous, more complete, than that previously imposed even upon public utilities? (3) Is each private individual engaged in local business, henceforth to be a little "super utility", hedged in by regulation and government red tape and performing at the behest of a centralized, bureaucratic Federal administration occupied in the formulation of policies never passed on by the duly elected representatives of the people?

If this be the destiny of a free people, who created a Federal Government of limited powers for the purpose of carrying out specified objects, then it is a sad one, indeed. We shall then have witnessed a complete cycle, at the end of which is the subjugation of the individual, regulated and regimented by a bureaucracy made up of those not elected

[1] *Baltimore and Ohio Railroad Company* v. *Interstate Commerce Commission*, 221 U. S. 612.

to handle local needs in the light of purely local conditions, but of an officialdom which acts upon a vague and sweeping delegation of authority from those elected to treat and deal only with specific national problems, including the commerce among the several States. We cannot believe that this end can be reached while our Constitution survives.

III

THE "STRAIGHT KILLING" PROVISION IS VOID BECAUSE NEITHER A REGULATION OF INTERSTATE COMMERCE NOR A REGULATION SUSTAINABLE UNDER ANY DEFINITION OF FAIR COMPETITION AND BECAUSE VIOLATIVE OF THE FIFTH AMENDMENT.

Ten of the counts on which the defendants were convicted were for violation of the "straight killing" provision of the Code.

This (Sec. 14, R. 37) prohibits:

> "The use, in the wholesale slaughtering of poultry, of any method of slaughtering other than 'straight killing' or killing on the basis of official grade."

This provision, like that governing wages and hours, is, therefore, a provision regulating production, *i.e.*, the manner in which poultry shall be slaughtered. As such it is open to all of the constitutional objections urged against the wage and hour provision.

Its effect is to prevent "selective buying." It does not appear that the practice of selective buying obstructs interstate commerce, affects the volume of its movement—as it obviously would not—gives rise to any monopolistic tendencies, or has been practised with the intent and purpose of controlling or affecting interstate commerce in any way.

The "straight killing" provision is not even one affecting interstate commerce in such a way as to bring it within the commerce power by the most liberal interpretation. As appears from the indictment and from the Code provision itself as well as from the evidence, the purpose of the "straight killing" provision is to prevent a slaughterer

from permitting his customers to select the fowls which he desires to buy and to compel him to buy in coops or in half coops and, in the latter event in the order in which the chickens come out of the coop. It is the imposition of a rule, the purpose of which is to prevent the customer from getting what he wants. "Selective buying" was referred to in the Government's brief below as one of the "evils" corrected by the Code. The evidence relied on in support of this contention and also for the purpose of linking "straight killing" with interstate commerce, is that of Government's witness Tottis, himself a slaughterer. The nature of the "evil" was thus naively stated by this witness on his direct examination by the Government:

> "Q. Will you explain the practice of selective killing that existed prior to the time that the Code became effective? A. Well, at that time a buyer went in and handled each bird himself and picked out just what he wanted." [R. 294.]

His objection to the practice was expressed with equal frankness and naivete on his direct examination by the Government as follows:

> "Q. What happened to the rest of this poultry? A. It was sold at a cheaper price to whichever buyer they could get at a satisfactory price. It was a sacrifice price." [R. 294-295.]

In the opinion of this witness, concurred in by the Government, selective killing is an "evil" because it permits the customer to buy what he chooses, leaving in the possession of the slaughterer inferior poultry required to be sold at a lower price. So much for the "evil".

The supposed effect upon interstate commerce is that if the straight killing practice is enforced poultry will be

graded before shipment. The only support for this is the opinion of the witness Tottis (R. 295) and of the witness Ternohlen (R. 433). The Poultry Code has been in effect since the date of its approval by the President, April 13, 1934 (R. 5), or for a period of six months prior to the beginning of the trial on October 17, 1934 (R. 1), which continued to November 1, 1934. Unless it is to be presumed that all slaughterers have been guilty of Code violations in which case it is for the Government to explain why only these defendants were indicted - it must be assumed that the "straight killing" practice has been observed generally by New York slaughterers in respect of the very large volume of poultry slaughtered in that city, which the Government emphasizes as indicating the importance of the Code. Yet no witness was called by the Government to testify that the "straight killing" practice had in fact resulted in grading poultry at points of shipment in support of the opinion of Mr. Tottis and Mr. Ternohlen that it would or should have this effect.

We should suppose that a farmer shipping poultry would put into the same crate all the poultry he had, old and young, fat and thin, tough and tender, roosters, capons (if any) and hens, expecting to receive for the poultry shipped that which it was worth according to its quality, leaving the purchaser at the other end to grade and price it accordingly. Perhaps this is not so. And there may be large assembly points where grading would be possible. If grading is the purpose then it would appear that the appropriate and direct way in which to bring it about would be to impose a requirement of grading at the point of shipment. That the Code does not do, presumably because so to do would work an unjustifiable hardship upon producers. To undertake to relate "straight kill-

ing" to interstate commerce as a means of bringing about grading at point of shipment is far fetched.

Moreover whether this practice is one affecting interstate commerce under any definition of the commerce power, it cannot be determined as a provision designed to promote or insure fair competition or to prevent the pursuit of unfair methods of competition in interstate commerce. The purpose, as stated, is to prevent selective buying, *i. e.*, to prevent the buyer from selecting out of the poultry on hand in the possession of any slaughterer, whether in one coop or many, those birds which he desires to buy. That privilege these defendants have accorded their customers. To accord such privilege is neither contrary to good morals, fair business practice or any other business standard set up by the courts or by any administrative tribunal. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421; *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568; *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463. On the contrary, the practice condemned by this rule is a proper practice. Any attempt upon the part of the Federal Government, under the guise of regulating interstate commerce, to prevent a buyer from buying what he wants and from paying therefor a price made by bargaining at arms length with the seller, and to require him to take that which he does not want, at some other price, is so arbitrary and unreasonable as to fall outside the realm of legitimate regulation of fair competition or competitive methods and to amount to a deprivation of property and of liberty of contract contrary to the Fifth Amendment.

IV

THE CODE PROVISIONS FORBIDDING THE SALE OF UNFIT POULTRY, REQUIRING INSPECTION IN ACCORDANCE WITH LOCAL INSPECTION LAWS, AND FORBIDDING SALE TO ANY PERSONS OTHER THAN THOSE LICENSED UNDER LOCAL LICENSE LAWS, IF ANY, ARE NOT REGULATIONS OF INTERSTATE COMMERCE OR WITHIN THE PURVIEW OF THE COMMERCE CLAUSE.

Each of these code provisions is an attempted regulation of the conditions of local sale. Their operation does not have its inception until after interstate commerce has ceased and the articles transported therein have come to rest and have become commingled with the general mass of goods within the state. They are intended for the protection of buyers purchasing, for consumption within the state, articles which have in the past been moved in interstate commerce. But the provision of regulations and the enactment of prohibitory statutes or ordinances for the protection of such local buyers are matters committed and reserved to the states by the Tenth Amendment. The State of New York is competent to establish such regulations and prohibitions. If it has failed to do so the Federal Government may not correct its omission under the guise of regulating interstate commerce.

We do not question the power of the Federal Government to exclude noxious articles from interstate commerce or to require inspection of articles moving therein for the purpose of preventing the movement of noxious articles.

These code-provisions are of neither character, but operate on sales after receipt and delivery in interstate commerce. Moreover, they may not be brought within the doctrine of the *Stafford* and kindred cases upon the theory that the regulation is necessary on account of any subsequent movement in interstate commerce. This is so for the reasons that it not only appears that none of the poultry slaughtered and resold by the defendants was sold either in interstate commerce or for subsequent movement therein, but for the local market exclusively; but that there is no evidence that any of the other slaughterers within the metropolitan area to whom the code applies sold otherwise than for the local market. There is therefore wanting that stream of commerce flowing *through* New York that was present in those cases. The prohibition against sale except in accordance with the code provisions, claimed to have been violated, was an attempted regulation of local commerce and not of interstate commerce or of activities so affecting interstate commerce, either within the meaning of the Constitution or of the cases, as to bring them within the reach of Federal authority.

1. The prohibition against sale of unfit poultry.

As demonstrated, this is not a prohibition against the movement of unfit poultry in interstate commerce, but a general prohibition against the sale of unfit poultry within the City of New York and for local consumption. As we have stated, and as will hereinafter be pointed out, it is believed that the evidence was insufficient to sustain the charge that the defendants "knowingly" sold unfit poultry.

The principle underlying the cases[1] which hold that the Congress has the power to prohibit the interstate transportation of certain articles may be summarized as follows:

The avenues of interstate commerce provide the facility for the dissemination across state lines of noxious articles. Congress has a complete power over such avenues and may therefore exclude therefrom such articles as are deemed generally harmful. In order to accomplish such exclusion it may be necessary to inspect the articles so carried from state to state, or it may, in order to enforce the rule of exclusion, be necessary to seize certain articles. It may well be that such inspection or seizure can take place only after the article to which the facilities of interstate commerce are forbidden has reached a certain point within the confines of a state. It has thus been held that a federal law may authorize the seizure of impure eggs which have been transported in interstate commerce after they have come to rest within a state and after they have been to a certain extent commingled with other goods therein (*Hipolite Egg Company* v. *United States*, 220 U. S. 45). In providing for such seizure the Food and Drug Act, as was said by Mr. Justice Holmes in *Weigle* v. *Curtice Brothers Co.*, 248 U. S. 285, "does not change or purport to change the moment at which an object ceases to move in interstate commerce." The violation of the code was the interstate transportation itself and, as Mr. Justice Holmes explained

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[1] *Champion* v. *Ames*, 188 U. S. 321.
Hipolite Egg Company v. *United States*, 220 U. S. 45.
Hoke v. *United States*, 227 U. S. 308.
Seven Cases v. *United States*, 239 U. S. 510.
Caminetti v. *United States*, 242 U. S. 470.
Brooks v. *United States*, 268 U. S. 432.
Oregon-Washington Co. v. *Washington*, 270 U. S. 87.
Thornton v. *United States*, 271 U. S. 414.

> "* * * There is no reason why a lien *ex delicto* should be lost by the end of the journey in which the wrong was done. The two things have no relation to each other. * * *"

Such a provision does not set up a rule of conduct in intrastate transactions but merely in the actual interstate transportation.

In *Brooks* v. *United States*, 267 U. S. 432, the Court sustained Section 3 of the Automobile Theft Act which punishes the transportation of a stolen automobile in interstate commerce and Section 4 of that Act, which punishes the storage of such vehicle with knowledge of its having been stolen. The decision as to Section 4 was reached on the ground that such provision merely made more effective the provision prohibiting the actual interstate transportation of a stolen automobile. It clearly appears from the opinion in the *Brooks* case that the validity of Section 4 provision depended upon the existence of Section 3.

The Code does not prohibit or punish the interstate transportation of diseased poultry. Liability under the Code attaches only to acts done after interstate commerce has ceased. Congress has here not attempted to close the avenues of interstate commerce to diseased poultry.

Even were the Code to prohibit the interstate transportation of diseased poultry, it could not have predicated such prohibition on the intrinsically harmful character of such poultry since the National Industrial Recovery Act does not define any "policy" with regard to the preservation of public health. Under the "declaration of policy" in the Act such an exclusion could have been grounded only upon a purpose indirectly to regulate purely intrastate activities. Therefore, such a prohibition would be of the same nature as that which was condemned in *Hammer* v. *Dagenhart*,

247 U. S. 251, and would not be analogous to the prohibition permitted in the *Lottery* case and kindred cases.

3. The provisions requiring inspection according to local laws or ordinances, if any.

This is again a regulation of the conditions of a local sale. The power of the Federal Government to require inspection of articles moving in interstate commerce for the purpose of preventing the movement of diseased animals is not disputed. Proceeding under an Act of Congress, the Department of Agriculture has provided such an inspection service. The defendants were not accused or convicted of a violation of the Federal inspection laws, but for violation of a code provision prohibiting the local sale of articles, which had ceased to be articles of interstate commerce, unless inspected in accordance with local inspection laws and ordinances, if any. Nor were the defendants accused or convicted of a violation of such local inspection laws or ordinances which carry with them their own penalties. The inspection provisions cannot be sustained upon any theory as a regulation of interstate commerce designed either to prohibit a movement of noxious articles in interstate commerce or their inspection under Federal authority. They constitute an attempt upon the part of the Federal Government to make it a misdemeanor under the Federal law for a person engaged in local commerce to sell poultry, unless the same has been inspected by state authorities in accordance with local inspection rules and laws, if any exist.

No analogy can be drawn between this provision of the Code and the statutes which were passed for the purpose of aiding the several states in enforcing their local laws

relating to the regulation or prohibition of the sale or manufacture of liquor. Those statutes, in effect, by their very terms sought only to complement such state laws by regulating interstate transportation of liquor into such states for the very reason that such transportation was beyond the legislative jurisdiction of such states (*Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U. S. 311; *In re Rahrer*, 140 U. S. 545). Those cases are wholly analogous to the *Lottery* and kindred cases. Moreover in *United States v. Hill*, 248 U. S. 420, the Reed Amendment was upheld despite the fact that, as applied to the situation there presented, it prohibited the importation into West Virginia of liquor in an instance where the West Virginia statute permitted such importation. Hence, it cannot be argued from those cases that the fact that Congress is seeking to further the legislative policy of the state can give to Congress powers which it would not have under the Commerce Clause. Clearly the provision of the Code requiring inspection according to local laws or ordinances is not a regulation of interstate commerce or of any matter affecting interstate commerce in such a way as to come within the Commerce Clause. In short, what the Code does in this respect is to borrow the State inspection law, except in its penal provisions, make it a Federal law, and then apply it not to inspection for the purposes of preventing movements in interstate commerce, but as a regulation of local sale.

3. Sales to dealers other than those licensed in accordance with local licensing provisions, if any.

The foregoing considerations apply here with the same force. Indeed, the relation between such sales and inter-

state commerce is even more remote than in respect of the other two regulations described above.

The only discernible effect of this provision is to aid in the enforcement of a state law requiring the licensing of retail dealers. In fact, it is not too much to say that there is no relation between a local sale to a dealer not licensed under local law and interstate commerce.

V

THE CODE PROVISION REQUIRING FILING OF REPORTS IS NOT WITHIN THE COMMERCE CLAUSE.

The defendants were convicted upon two counts (counts 38 and 39), one of which charged the making of false reports for a period of about a month and the other of which charged the failure to make any reports whatsoever thereafter. These convictions rest upon a Code provision requiring the making of weekly reports showing the volume of sales and range of prices. They constitute the attempted exercise of visitorial powers over persons engaged in the live poultry industry in the City of New York, including these defendants. Unless the business in which these defendants were engaged was such as to be brought within the scope of Federal regulation, it would seem that Congress was without authority to exercise such visitorial powers. The defendants are not engaged in interstate commerce. Their sales were not made in interstate commerce, but locally.

The information required to be given obliged them to expose the secrets of their business, *i.e.*, their volume of sales and range of prices. Neither was within the power of Congress to regulate. The business of the persons from whom such reports were required was not within the power of Congress to regulate. The reports were not to be made directly to the Government but to the Code Authority purporting to represent the industry in which the defendants are engaged, and representing their competitors, as well as themselves. The requiring of such reports was not authorized by the Commerce Clause and constituted a denial of due process. See, *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298.

VI

THE PENAL PROVISION OF THE RECOVERY ACT IS WHOLLY VAGUE AND INDEFINITE AND HENCE UNCONSTITUTIONAL AND VOID.

The only section of the Recovery Act which provides a fine for a violation of any provision of a code is Section 3 (f)[1], which provides:

> "When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500, for each offense, and each day such violation continues shall be deemed a separate offense."

Whether a person is to be deemed an offender and subjected to punishment under the terms of Section 3 (f) requires a determination, *inter alia*, of the question whether the transaction in which such person was engaged at the time of the alleged violation affected interstate or foreign commerce. Whereas it is a well established principle of law that "every man should be able to know with certainty when he is committing a crime" (*U. S.* v. *Reese*, 92 U. S. 214, 220), the standard of guilt set up by Section 3 (f) is so vague and so difficult to ascertain that no one can determine what course of conduct must be pursued in order to avoid punishment under that section. The limits of the

[1]The provisions of Section 10 (a) for fine and imprisonment have reference only to a violation of a rule or regulation prescribed by the President.

significance of the word "affect" itself cannot be determined with any semblance of precision. The word, itself, has been defined to mean "to lay hold on; to act upon; to produce an effect upon; * * * to touch." (1 Webster's New International Dictionary 1925, p. 37.) That significance is rendered even more undeterminable, if possible, by the application which is made of the word "affect" in Section 3 (f) of the Recovery Act.

Whether a given transaction will "produce an effect upon" interstate commerce is a question which in a complex economic society involves factors so multitudinous and so interwoven with inoperative circumstances that even an exhaustive study will not provide an answer. The conflicting testimony in this case amply demonstrates that the question is practically impossible of solution.

Moreover, the Government in its brief has denied that it is contending that any form of activity which might have only a fanciful connection with interstate commerce is within the power of Congress to control. Thus, in order to avoid punishment a person is required by The Recovery Act not only to ascertain whether his conduct will have any effect whatever on interstate commerce but also whether such effect will be of a degree sufficient to bring his conduct within the control of the Federal Government under the power of that Government to "regulate commerce among the several states."

Having in Section 1 of The Recovery Act declared its "policy" to "remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof", Congress, according to the Government, sought to exercise the entire scope of its power under the Commerce Clause by the use of the words "in or affecting

interstate or foreign commerce" in Section 3 (f). In order to determine whether his conduct falls within the inhibition of the Act a person is thus compelled to ascertain the ultimate limits of the Federal power under the Commerce Clause of the Constitution.

Moreover, according to the Government's contention, the question so to be answered depends upon the existence of facts which cannot be ascertained by a person seeking to adopt a rule of conduct in accordance with the terms of the Recovery Act, for guilt is made to depend not upon the effect of his *own* acts on interstate commerce but upon whether a practice in a trade is sufficiently general to affect interstate commerce more than "fancifully."

Finally, the practice must be one condemned by a code of "fair competition" containing provisions approved by the President. As previously pointed out, it is claimed by the Government that "fair competition", as employed in the Recovery Act, is broader in scope than the phrase "unfair methods of competition" employed in the Federal Trade Commission Act. Unless "fair competition" is infinitely broad and permits the President to approve any sort of code provision in his uncontrolled discretion (in which event the Recovery Act is clearly invalid as an improper delegation of legislative authority), such phrase must be subject to interpretation and construction by the courts, and the added burden is thus imposed upon the citizen of determining whether provisions contained in codes are provisions for "fair competition" within the meaning of the Act.

To put it mildly, Congress has departed no little from the well-known standard of legislative action that

> "If the Legislature undertakes to define by statute a new offense, and provides for its punish-

> ment, it should express its will in language that need not deceive the common mind." (*United States* v. *Reese*, *supra*, at p. 220.)

The Recovery Act by Section 3 (f) thus declares unlawful a class of acts which it defines, not by their intrinsic nature, but by their indirect, contingent and unascertainable results.

The principle that a penal statute may be unconstitutional for indefiniteness and vagueness is so firmly established that a voluminous citation of authorities would be supererogatory.[2]

The doctrine was stated by this Court in *Connally* v. *General Construction Co.*, 269 U. S. 385, in the following terms:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In that case the statute required "that not less than the current rate of per diem wages in the locality where the work is performed" should be paid to all persons employed by Government contractors. The statute was held void.

In *United States* v. *Cohen Grocery Co.*, 255 U. S. 81,

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[2] *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221; *Collins* v. *Kentucky*, 234 U. S. 634, 637; *American Seeding Machine Co.* v. *Kentucky*, 236 U. S. 660, 662; *U. S.* v. *Brewer*, 139 U. S. 278.

this Court held unconstitutional Section 4 of the Lever Act (41 stat. 297) which made it unlawful for any person

> "willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person * * * to exact excessive prices for any necessaries * * *."

This Court said at page 89:

> "* * * to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

Can it be said that it is less difficult to determine whether an act is one contravening the nebulous "standard" of "fair competition" attempted to be erected by the Government, or is one "affecting" interstate commerce than it is to determine the current wage rate in a small community?

It would seem that even the determination of what is "an unjust and unreasonable rate or charge" would present, in a society where at least broad principles of justice and reason prevail with a certain degree of uniformity, a problem far more capable of solution than the intricate, confused and consequently disputed problem of the interaction of economic forces.

PART II

QUESTIONS INVOLVED OTHER THAN CONSTITUTIONAL ONES

VII

SINCE SOME PROVISIONS OF THE CODE ARE CLEARLY UNCONSTITUTIONAL OR UNAUTHORIZED BY THE STATUTE OR BOTH, THE WHOLE CODE MUST FALL BECAUSE OF THE LACK OF A SEPARABILITY CLAUSE.

We have discussed *inter alia*, the "straight killing" requirement of the Live Poultry Code and the provisions for minimum wages and maximum hours of labor and have shown such provisions to be arbitrary and capricious regulations having no substantial relation to unfair competition or unfair methods of competition or to interstate commerce. We have not discussed in detail other provisions of the Live Poultry Code which are plainly obnoxious to due process of law, such as Section 9 of Article V, which requires that each slaughter house operator in order "to increase employment and to standardize the cost of marketing and selling" regularly employ not less than one employee if the volume of his weekly sales of live poultry averaged over a period of four weeks is less than 6,000 pounds but in excess of 8,000 pounds, not less than two employees if between 8,000 pounds and 11,000 pounds, etc., and the provisions of Section 7 of Article VII relative to selling or offering to sell a product below the current market price. Such provisions are not only plainly contrary to the Fifth

and Tenth Amendments, but cannot possibly be said to have been authorized by the statute.

Section 3 of the Recovery Act only permits the President to approve a code of fair competition in its entirety. He is not authorized to approve individual provisions and has not done so. Thus if any provision of the Live Poultry Code is invalid because in contravention of due process of law or is not authorized by the statute, then the Code as a whole falls and none of its provisions are enforceable. Such is plainly the case here.

The leading case is *United States* v. *Reese*, 92 U. S. 214. There a statute punishing election officers for refusal to permit properly qualified voters to vote was held unconstitutional. This Court held that the provisions of the statute were not separable and that it was not applicable to a refusal to permit qualified negroes to vote, a question over which Congress clearly had power under the Thirteenth Amendment to the Constitution. The Court stated at page 221:

> "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there by any such, from that which is not. * * * Each of the sections must stand as a whole, or fall altogether. * * *"

Similarly, in *The Employers' Liability Cases*, 207 U. S. 463, 504, this Court, after holding that the legislation in question attempted to regulate certain matters in intrastate commerce, refused to separate the provisions of the Act and to hold it applicable to interstate commerce.[1]

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[1] For other cases in which this Court has refused to separate the provisions of a statute and to give effect to the portion or portions which were constitutional, see the *Trade Mark* Cases, 100 U. S. 82, at page 89; *United States* v. *Harris*, 106 U. S. 629, at page 641; *Virginia Coupon* Cases, 114 U. S. 270, at page 305; *James* v. *Bowman*, 190 U. S. 127, at page 140; and *Butts* v. *Merchants Transportation Co.*, 230 U. S. 126, at page 133.

VIII

THE DEFENDANTS' DEMURRER SHOULD HAVE BEEN SUSTAINED WITH RESPECT TO COUNTS 4, 5, 60 AND 38, WITHOUT REGARD TO THE CONSTITUTIONALITY OF THE RECOVERY ACT. THE COURT COULD NOT TAKE JUDICIAL NOTICE OF MUNICIPAL ORDINANCES, RULES AND REGULATIONS.

Counts 4 and 5 of the indictment charge the defendants with violating Article VII, Section 22 of the Live Poultry Code in a transaction affecting interstate commerce.

Section 22 of the Live Poultry Code prohibits the sale of live poultry which has not been inspected and approved in accordance with the rules, regulations and/or ordinances of the particular area (R. 39). (In this instance the City of New York.)

Count 60 charges three individual defendants who were operating as the A. L. A. Schechter Poultry Corporation, and said corporation with the sale of live poultry to the other corporate defendant and an individual defendant connected therewith, "persons not legally entitled to conduct the business of handling live poultry, *and not having a permit or licence to handle, sell, or slaughter live poultry as is required by the ordinances of the City of New York, and by the rules and regulations of the Board of Health of the City of New York,* * * *"[1]

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[1]The quoted language is taken from the indictment (R. 117) and constitutes the charge.

Neither the indictment nor the Live Poultry Code set forth the ordinances and regulations of the City of New York, with violation of which the defendants were charged in these three counts.

The law is well established that the courts take judicial notice of the laws and treaties of the United States; the date of the ratification of an amendment to the Constitution of the United States; and the laws of each of the States in the union (when the court is exercising original jurisdiction under the Constitution and laws of the United States).

The courts do not take judicial notice of municipal ordinances, or of foreign laws." Hughes, Federal Practice, Vol. 6, c. 83; *Robinson* v. *Denver City Tramway Co.*, (C. C. A. 8) 164 Fed. 174; *Choctaw, O. & G. R. Co.* v. *Hamilton*, (C. C. E. D. Okla.) 182 Fed. 117; *Garlich* v. *Northern Pac. R. R.*, (C. C. A. 8) 131 Fed. 837); *King* v. *Augusta*, 277 U. S. 100, 126 (footnote[10]).

The trial court overruled the demurrer as to these counts, citing Section 1172 of the New York City Charter, which provides that all courts in the City of New York shall take judicial notice of city ordinances.

Referring to *Greenberg* v. *Schlanger*, 229 N. Y. 120, the trial court stated that "the state Courts have held, under this provision (Section 1172), that the New York Supreme Court, the highest Court of original jurisdiction in the State, sitting in New York City, will take judicial notice of city ordinances".

The State appellate courts take judicial notice of city ordinances on the theory that whatever the court of the first instance should take judicial notice of, the State appellate courts may notice. *Board of Health* v. *Farrell*, 178 App. Div. 714, 715.

The charge is a Federal offense. The proceedings had herein were in a Federal court. The mere fact that the District Court building is located in the City of New York, does not make that Court a court of the City of New York, nor is it governed by the procedure followed in the State courts. The Conformity Act, which conforms the procedure to be followed in the Federal courts with that in the State courts, is inapplicable in a criminal prosecution. *Gay* v. *United States* (C. C. A. 5th), 12 F. (2d) 433.

It is further significant that the Section of the New York City Charter relied upon by the trial court is limited to ordinances and excludes rules and regulations. The 60th Count makes reference to an ordinance of the City of New York, which is not described, and to rules and regulations. Even the State courts cannot take judicial notice of rules and regulations.

The Circuit Court of Appeals sustained the ruling of the trial court, citing *Martin's Adm.* v. *B. & O. R. R.*, 151 U. S. 673; *Kaye* v. *May*, 296 Fed. 450; and *Pennington* v. *Gibson*, 57 U. S. 65.

In all of the above cases the rule enunciated was that a Federal court may take judicial notice of a State statute. None of such cases dealt with municipal ordinances or rules and regulations.

Count 38 charges the defendants with submitting reports which contained false and fictitious statements relating to range of prices and volume of sales, in violation of Article VIII, Section 3 of the Live Poultry Code (R. 91).

Article VI, Sections 1 and 2 provide generally for the administration of the Live Poultry Code (R. 25-34) but make no mention of making and filing reports; Article VIII, Section 3, states that "Every member of the industry

shall submit a weekly report to the Code Supervisor. Such report shall show the range of daily prices and volume of sales.

The Live Poultry Code does not make it a crime to file false reports. The learned trial judge refused to sustain the demurrer on the ground "that the making of a false report is not a compliance with the requirement for the making of a report" (R. 161). In other words, the making of a false report is no report.

Penal provisions must be strictly construed. Statutes creating and defining crimes cannot be extended by intendment and no act however wrongful can be punished under such a statute unless clearly within its terms. There can be no constructive offense. Before a man can be punished his case must plainly and unmistakably be within the statutes under which he is prosecuted.

IX

THERE WAS A FAILURE OF PROOF ON A NUMBER OF COUNTS.

1. There was failure of proof on the count charging sale of poultry unfit for use.

As appears from the statement, the defendants were indicted on two counts (Counts 2 and 3) for the alleged sale of unfit poultry; the second count, covering the sale of one alleged unfit chicken (R. 63) and the third count, covering the sale of two alleged unfit chickens (R. 65). The defendants were acquitted on the third count but convicted on the second.

The fact is that no case was made. As appears from the statement, the code provision charged to have been violated prohibits the sale "knowingly" of unfit poultry (R. 34). Any other provision would, of course, be so unreasonable as in itself to be beyond governmental power. No person may or should be convicted of an innocent sale. In any event the Live Poultry Code does not so provide. The evidence on the count on which the defendants were convicted of the sale of one unfit chicken and on which they were acquitted of selling two unfit chickens was given by the same witness and was substantially identical (with a single exception) in respect of both. That witness was an employee of the Code Authority, a young man fresh from an agricultural college (R. 737).

The witness referred to was sent to the defendants' place of business for the purpose of spying upon their operations (R. 726-730). He was sent there without doubt to "get" the defendants. While there he saw three chickens which previously had been inspected and

found healthy (R. 705), but which aroused his suspicion. Making application of the wisdom acquired in the agricultural college he placed an identification mark upon the feet of each of the three (R. 708). Thereupon he watched for their sale and followed them into the possession of their purchaser (R. 709). There he met a Board of Health officer, sent at the request of the attorneys for the Code Authority to make a special examination of these chickens (R. 708) and exhibited his quarry to the latter (R. 708). According to this witness's own testimony, the Board of Health officer found it necessary to perform a *post mortem* inspection upon the chickens. Upon its performance two of the suspected chickens were found to be suitable for human consumption and the third eggbound, whatever effect that may have upon rendering a chicken fit or unfit for human consumption (R. 710). Not until the performance of the *post mortem* examination did the alleged defective character of the one chicken referred to appear.

Government witness, Dr. Ives, testified that not even he was familiar with all poultry diseases (R. 219). That no one can tell what is wrong with a chicken unless the same is opened (R. 226). That the average market man although in the chicken business for a long time, and although he may purchase a great quantity of chickens, is not qualified and does not know when a chicken is fit or unfit (R. 233).

Upon this evidence the jury acquitted the defendants upon the charge relating to the two chickens whose autopsy developed that there was nothing wrong with them but convicted on the charge relating to the other. The young man who engineered and carried out, single-handed, this exploit in criminal detection, testified that he did not call the attention of the defendants to his suspicions regarding these

three chickens (R. 706) nor did he testify that they were aware of their condition. And as we have said, the Board of Health officer, called for the specific purpose of condemning these chickens, found it necessary to perform a *post mortem* examination and then condemned only one of the three chickens. This is the evidence upon which the defendants were convicted of selling unfit poultry. It is clearly insufficient to support the verdict and was insufficient to warrant the submission of this count to the jury. Only by contending that it is the duty of slaughterers to perform a post mortem examination on chickens slaughtered before sale may this conviction be allowed to stand. *United States* v. *Murdock*, 290 U. S. 389.

2. The Sale of Uninspected Poultry.

Counts 4 and 5 charge the defendants with the sale of certain poultry trucked in from Philadelphia, not previously inspected as required by local law. There was no charge that any Federal law requiring inspection was violated.

The evidence establishes that the poultry which was not inspected was a small portion of shipments from Philadelphia which was received in New York on a Sunday night (R. 1396) at which time no inspection could be had (R. 235). The greater portion of the entire shipment was inspected (R. 1394-5). To submit them for inspection the next day was impracticable because they were required for resale in the early morning (R. 1396). The entire lot was declared to be of the best quality by the seller who testified for the Government (R. 1005-1006).

In any event, the validity of a conviction depends upon the proof of a *sale* and the evidence is undisputed that the 59 baskets referred to in Count 4 were purchased by the de-

fendants on behalf of the Mogen David Live Poultry Market, Inc. (R. 1396). In fact, such poultry was trucked from Philadelphia to New York City by an independent trucker who was paid by the Mogen David Live Poultry Market, Inc. (R. 1619).

3. The Filing of False Reports.

The defendants[8] are charged with the filing of false reports, in that reports filed for each of the weeks from the week ending May 19th to and including the week ending June 11th, 1934, did not contain a correct statement of the volume of sales, in violation of Article VI, Sections 1 and 2 and Article VIII, Section 3 of the Live Poultry Code.

Proof adduced by the Government was that the volume of sales for that period of time was in the amount of 151,861 lbs., whereas, the reports as filed only show a volume of 106,659 lbs., a difference of 45,202 lbs. (R. 1058).

The object of the Code provisions with respect to the filing of reports is to enable the Code Authority to make assessments. The amount therefore involved, on the basis of an assessment of $.20 per 1,000 lbs., is $9.04.

The reports were not false. The computation made by the Government failed to take into consideration "accommodation" sales.[9] These accommodation sales are purchases

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[8]The defendants, A. L. A. Schechter Poultry Corporation and Martin Schechter, are the only defendants involved in this Count.

[9]An accommodation sale is illustrated as follows: One of the corporate defendants would buy a truckload of poultry, half or any part thereof for its own use and the balance thereof for the use of the Mogen David Live Poultry Market, Inc., in order to save trucking expenses. Although the transaction would be listed on the books in its totality, this would be only for the purpose of keeping the accounts of the various parties accurate.

made by one of the corporate defendants on behalf of the other corporate defendant or on behalf of the Mogen David Live Poultry Market, Inc. (operated by the father of the individual defendants).

It is also contended by the Government that the report as filed was false with respect to the range of daily prices. This contention is erroneous in that the range of daily prices was arrived at by taking an average price for the total volume of sales, which included the price range for separate and distinct classes of poultry, to wit: colored fowl, leghorn fowl and broilers. The correct procedure would be to average each class of poultry by itself.

The Government failed to establish in any manner the effect of the filing of a false report upon interstate commerce. That there is no effect needs no further argument.

Count 38 is also open to the objection that the requirement of filing reports is contrary to the Fourth and Fifth Amendments to the Constitution. This is developed more fully in the discussion of Count 39.

4. The Failure to File Reports.

The defendants, under this count (Count 39), are charged with wilfully, knowingly and unlawfully failing and refusing to submit weekly reports or any reports for the period commencing June 11, to and including July 26, 1934, in violation of Article VIII, Section 3 of the Live Poultry Code.

With respect to defendants, Schechter Live Poultry Market and Joseph Schechter, the Government's Exhibit 29 brands the charge as unfounded. Exhibit 29 clearly indicates that reports were filed by these defendants for the weeks ending June 15th and June 22nd. The record

further shows that these defendants went out of business on July 7, 1934, by reason of their inability to remain in business due to the persecution of the Code Authority (R. 1431-2).

The other defendants admit that they did not file any reports from June 11th to July 26th, 1934.

They were justified in not filing these reports by reason of the direct information given by the Government authorities that the latter were preparing a criminal prosecution against the defendants for violations of the Recovery Act, and of the Code provisions (R. 548).

It is well established that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the prohibition of the Fourth Amendment to the Constitution. The unreasonable searches and seizures condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is equivalent to having a witness testify against himself, which practice is condemned under the Fifth Amendment. *Boyd* v. *United States*, 116 U. S. 616; *Weeks* v. *United States*, 232 U. S. 383.

In addition thereto, the defendants had retained counsel to advise whether or not one engaged in industry and operating at a loss would nevertheless be obliged to pay code assessments. It was during the period in which negotiations between the defendants' counsel and the Code Supervisor were in progress that the failure to file reports occurred. Immediately upon the close of such negotiations an indictment was returned.

We maintain that there is no legal authority for the imposition of the assessment.

The other essential element required to the successful prosecution of the defendants, to wit: that the non-filing of reports affects interstate commerce, was not proved. The Government offered no evidence on this point.

5. The Counts Relating to Minimum Wages and Maximum Hours.

In view of the reversal by the Circuit Court of Appeals of the convictions on these Counts, on the ground that the provisions of the Live Poultry Code relating to wages and hours of labor were unconstitutional the evidence relating to such Counts need not be discussed.

6. The Sale to Unlicensed Poultry Dealers.

This Count charges the individual defendants connected with the A. L. A. Schechter Poultry Corporation and A. L. Schechter Poultry Corporation, with the unlawful *sale* of live poultry to the other defendants, Joseph Schechter and Schechter Live Poultry Market, in that Joseph Schechter and/or Schechter Live Poultry Market were persons not legally entitled to conduct the business of handling live poultry, not having a permit[11] or license to handle, sell or slaughter live poultry as required by the ordinances of

[11]Article 2, Section 19 of the Sanitary Code of the City of New York provides:

> "No live rabbits or poultry shall be brought into, or kept, held, offered for sale, sold or killed in, any yard, area, cellar, coop, building, premises, public market, or other public place, except premises used for farming in unimproved sections of the City, without a permit therefor issued by the Board of Health, or otherwise than in accordance with the terms of said permit and with the regulations of said Board."

the City of New York, and by the rules and regulations of the Board of Health of the City of New York, in violation of Article VIII, Section 15 of the Live Poultry Code.

Counsel for the Government stipulated in the record that the place of business conducted by the defendants, Schechter Live Poultry Market and Joseph Schechter, was licensed in the name of Sam Schechter, but not in the name of either of the two defendants above named (R. 1432). Sam Schechter had sold the business to Joseph Schechter.

Furthermore, the veterinarian for the Department of Health, when called as a witness for the Government, testified that the Board of Health always knew that Joseph Schechter was the owner or operator and that the matter "was straightened out afterwards with the Department" (R. 596).

A reading of the regulation indicates that all that is necessary is a permit in the premises. The place of business of the defendants, Schechter Live Poultry Market and Joseph Schechter, did have a license.

In addition thereto, it has been previously shown that no *sale* did in fact take place. The transaction was an accommodation purchase.

X

DEFENDANTS WERE IMPROPERLY CONVICTED UPON THE CONSPIRACY CHARGE

The conviction of the several defendants upon the charge of conspiracy to commit an offense against the United States (Count 1, R. 2-62) is based upon an indictment which charges a conspiracy having a number of separate objects such as selling unfit poultry, selling uninspected poultry, violating "straight killing", submitting false reports, refusing to submit reports, paying less than the minimum wages established by the Live Poultry Code, requiring an employee to work more than the maximum hours established by the said Code and interfering with the execution of the Code by the Code Supervisor, all in violation of said Live Poultry Code (R. 48-49).

It is well settled that proof of a conspiracy having any one of the objects referred to in the indictment is sufficient to sustain a conviction providing the object in question is an offense against the United States Government.

Hogan v. *United States* (C. C. A. 5th), 48 F. (2d) 516, involved an indictment charging a conspiracy to commit an offense against the United States (1) by importing intoxicating liquors in violation of the National Prohibition and Tariff Laws, and (2) by transporting intoxicating liquors in violation of the National Prohibition Law. In discussing this indictment, the Court stated, at page 517:

> "There is no merit in the attack on the conspiracy count. It is competent to charge, and the indictment does charge, simply and clearly, a single conspiracy to violate both the tariff and the prohibition acts, and proof as to either will support conviction."

In *McDonnell* v. *United States*, 19 F. (2d) 801 (C. C. A. 1st), the Court reached the same conclusion upon the same facts and held that the proof was sufficient even if it related only to the unlawful transportation of liquors and thus proved only one of the objects of the conspiracy charged in the indictment. For other decisions to the same effect, see *Christiansen* v. *United States*, 52 F. (2d) 950 (C. C. A. 5th), and *Commonwealth* v. *Meserve*, 154 Mass. 64, at page 73.

It is impossible to determine whether the jury in finding the defendants guilty of conspiracy found them guilty of conspiring to perpetrate any particular one or more of the objects enumerated in the indictment. The record discloses that the jury really desired to limit the verdict to a verdict of guilty of a conspiracy to interfere with and obstruct the Code Supervisor in the performance of his duties (Code, Art. VI, Secs. b(1) and b(2), R., fol. 147, 1551-1552). This is not even a violation of the Code.

Therefore, if this court should hold that the agreement to carry out any one or more of the objects charged in the indictment would not constitute an offense against the statute, the conviction of a conspiracy must be reversed. Otherwise the defendants may be sentenced for a criminal conspiracy consisting of nothing more than a combination to do an act not in contravention of law.

That the offenses contained in the counts upon which the defendants were convicted were not proven, that they should not have been submitted to the jury, has been argued heretofore in this brief. The conspiracy is alleged to have been entered into on May 16, 1934. While an agreement to violate the law may be inferred from overt acts or circumstantial evidence, in this case the Government relied on direct evidence.

On June 1, 1934, a representative of the Code Authority, who was also employed by an accounting firm which had many clients in the live poultry industry, called at the place of business of the defendant, A. L. A. Schechter Poultry Corporation, and sought to examine the books. He appeared without a previous appointment, and without credentials of identification (R. 515). He telephoned to the Code Supervisor and Joseph Schechter being thereupon called to the telephone, according to the testimony of the Code representative, made the following statement over the telephone to the Code Supervisor:

"We are violating the Code every minute of the day."

He also testified that the brothers of Joseph Schechter were near the telephone at the time when those words were spoken, but said nothing.

Some of the defendants were willing to permit an examination of the books but Joseph Schechter suggested that the defendants first consult their attorney to determine whether or not the Code Authority was entitled to examine their books (R. 521). The defendants also suggested that they would first like to speak to Mr. Peterson, the Code Supervisor, before permitting an examination (R. 500-517). It appears that the defendants did consult their attorney after this incident, and two conferences with the Code Supervisor were held between June 1 and June 18, 1934.

It is claimed that at the conference of June 18, 1934, which his attorney attended, the defendant Joseph Schechter, admitted to the Code Supervisor that he and his brothers were violating the Code and confirmed the statement alleged to have been made over the telephone on June 1, 1934 (R. 529). Said conference was arranged by

the defendants and their attorney, to ascertain whether the Code Authority was legally entitled to examine the books, and whether the defendants were obligated to pay assessments although they were operating at a loss (R. 542-5).

At the conclusion of the conference, the defendants and their attorney were advised that the matter had been placed in the hands of the Department of Justice, and that nothing could be done about the situation (R. 548). Prior to that conference, however, neither the defendants nor their attorney were advised of the already contemplated criminal prosecution.

From the foregoing recital it is contended that a concerted plan to violate the Code was proved.

It is to be noted that the above quoted statement was alleged to have been made by Joseph Schechter. He spoke for himself only. None of the other brothers made any such statement nor does the government claim that they did. The mere statement cannot constitute a plan or scheme as well as an agreement or understanding to violate the code. *United States* v. *Munday* (C. C. N. D. Wash.), 186 Fed. 375. It was a mere opinion, binding only the defendant Joseph Schechter. A conspiracy cannot be predicated upon blood-relationship. The mere fact that several persons have simultaneously engaged in a course of conduct, even assuming such conduct to have been unlawful (which has not been established in this case) is not enough to constitate a conspiracy.

If the Government relies solely upon the statement made over the telephone and the subsequent alleged confirmation of that statement no further argument need be made that no conspiracy was proved. However, the Government, through the testimony of witnesses, Cohen and Danziger, employees of one of the defendants and of witnesses,

Alampi and Forsmith, employees of the Code Authority, attempted to supply alleged declarations and acts to establish a concerted plan. The interest of the above mentioned witnesses will be shown.

Cohen was the secretary of Local 167 of the Chicken Helpers Union (R. 876). The Union had previously called a strike to compel the defendants to employ other help (R. 960). Danziger was the man hired as a result of the strike. One of the Schechter brothers was a witness for the prosecution at a trial in which an executive of the same union was convicted of a crime. Cohen and Danziger were out to "get" the Schechters. On May 23, 1934, they appeared at the Code Supervisor's office and there received instructions on how to "get" evidence against the Schechters (R. 958). Cohen testified that he volunteered to give the Government an affidavit, which later formed part of the basis of the indictment returned.

These witnesses in their zeal to point a finger at the defendants, would have it appear that it is extraordinary for chickens to die on a hot day. From the fact that these chickens were put in a bag, they would have it inferred that the chickens were subsequently sold; however, they could not state that the chickens were in fact sold. No proof that the chickens were subsequently sold was offered by the Government.

The testimony of these two witnesses in respect of sales of "culls" by the defendants was not only biased, but proceeded from an erroneous conception of the meaning of the word "cull". A "cull" is defined in the Live Poultry Code as "poultry unfit for human consumption". Cohen, however, defined a cull as a chicken with a broken leg or wing (R. 886) and Danziger stated it to be a chicken with no meat on the breast, but edible if not diseased (R. 970). We

call attention likewise to the fact that although these two employees stated that unfit poultry was sold each day in the place of business of the defendants, they themselves took some of the same poultry home to their own families (R. 969).

An even more extraordinary situation arises in the case of the witness Forsmith, who was the Chief Inspector of the Live Poultry Code. Although engaged generally in the investigation of slaughter house practices in the metropolitan area (R. 641), he was in the business of making purchases of chickens in West Washington Market (R. 653). The bias of a competitor is self-evident. That he was not too well disposed toward the defendants is further evidenced by the fact that his brother had been discharged from the employ of the defendants (R. 653).

Witness Alampi obviously was sent down to the place of business of the defendants with instructions to get evidence against the Schechters. He knew that a raise in salary was awaiting him if he obtained the evidence; his interest is, therefore, apparent. Accordingly, when he believed three chickens to be unfit he told no one about it; he deemed it more advisable that they be sold on the assumption that if he could establish the sale he would then have obtained the incriminating evidence he so desired. He did, in fact, get the raise in salary (R. 726).

The conduct of the defendants should be considered in its entirety. In that light, it is obvious from various conferences of the defendants at the offices of the Code Authority that defendants intended to cooperate with that authority in every possible manner. Government accountants were permitted to examine the defendants' books for eight consecutive days. The defendants tolerated the presence of three inspectors, out of five employed by

the Code Supervisor, at their place of business for a period of approximately one month, although the investigators interfered with the conduct of their business.

Uncontradictable proof that every chicken sold by the defendants was slaughtered in accordance with Jewish dietary laws and that no diseased chickens were slaughtered or sold was given by two shochets of long experience, one of whom is a Rabbi (R. 1203-1207, 1281).

Code Supervisor Peterson received an annual salary of $13,000; his assistant $5,000; his counsel $6,000; and various employees $75.00 per week (R. 556).

The groundwork for the prosecution was laid prior to June 1, 1934. There is testimony in the record that the Code Supervisor stated, in attempting to justify an assessment of $80,000 which he deemed necessary to run his office, "We are going to get an indictment and convict the Schechter brothers and that will be a whip over it" (R. 1166).

Mr. Forsmith, Chief Inspector, on the staff of the Code Inspector, was heard (R. 1167) to remark in reply to the question, "Abe, what have you done so far for the industry? You originated that Code, and you are in the code, and you are just ruining us." "Louis, I know it, the only benefits so far that is got out of this industry is myself and Mr. Peterson."

Mr. Peterson was heard to say, prior to the indictment: "We got to get somebody to set an example in the industry for enforcement of this Code. We are building up a fine case against the Schechter brothers" (R. 1169).

Aside from the reprehensible conduct of a Government official to enlist the aid of employees to obtain evidence for the conviction of their employers, it is significant that although the Code Supervisor admitted that there were no

code violations between May 16 and May 23, 1934, the two employees of the defendants were called to the office of the Code Supervisor, where the attorney for the Code Supervisor was present, and then and there instructed in the manner they were to proceed to obtain evidence against the Schechters (R. 958).

In fact, one of the attorneys for the Code Supervisor, who on behalf of the Code Supervisor built up a case against the Schechters, attempted to obtain a counsel fund in the sum of $900 from members of the industry, to assist in the prosecution in the District Court (R. 684).

The record is replete with these and further instances revealing unprecedented persecution of law-abiding citizens.

This Court, in prior cases, has condemned, in no unmistakable terms, the prevalent practice engaged in by Government prosecuting attorneys of elevating misdemeanors to felonies by the subterfuge of charging the crime of conspiracy. *Report of Attorney General*, 1925, page 5. It was not intended by Congress that a violation of a Code provision should be a felony. Had Congress so intended, it would have so stated in Section 3 (f). The will of Congress should not be set at naught by the arbitrary action of prosecuting attorneys.

XI

NUMEROUS ERRORS WERE COMMITTED BY THE TRIAL COURT. DEFENDANTS DID NOT RECEIVE A FAIR TRIAL.

A. It was error to deny defendants' motion for a bill of particulars.

The indictment was lengthy and vague, making it impossible for the defendants to understand the nature and cause of the accusation against them.

The trial court in overruling the demurrer stated (R. 151-152).

> "In the Recovery Act the intent of Congress was to extend criminal jurisdiction so as to reach all cases where violations of approved codes affect interstate commerce, whether or not they substantially or unreasonably restrain such commerce.
>
> "Of course, the violations must substantially affect interstate commerce and not be merely incidental."

The view expressed by the trial court made the necessity for a bill of particulars more acute and the refusal to grant it error. *Nelson* v. *United States,* 273 Fed. 307; *Rosen* v. *United States,* 161 U. S. 34.

B. The court erred in reading the indictment to the jury. It operated to the great prejudice of the defendants because its reading by the court gave the matters alleged therein the semblance of truth.

C. The court erred in failing to charge the jury as requested. The request and the court's ruling thereon follow:

"May it please your Honor, I except to so much of your charge as does not adequately explain to the jury what is meant by affecting interstate commerce. I ask your Honor to charge that the indictment as you read it states the defendants' conduct in each particular count alleged, tended to and did diminish the total volume or value of the commerce that comes into the State, that their particular conduct disrupted the orderly flow thereof and diminished and demoralized the character thereof, and unless the Jury finds that their conduct did such a thing, their acts did not affect interstate commerce.

"The Court: I have already charged them. I read it at great length, the whole indictment. I told them that the charge in the indictment is what the Government is required to prove and asked the Jury to determine whether the Government has proved its case. I am not going to charge separate parts. I made that charge plain and distinct, and I think the Jury understood it. I read the whole of the first count, too.

"MR. HELLER: EXCEPTION (R. 1541-1543).

"* * * I ask your Honor to charge that what I just said applies to each particular count separately; they must be considered separate and apart.

* * * * *

"The Court: Let me see it. I read them at very great length. Each count, of course, depends upon the acts affecting interstate commerce. I find no necessity for further charging the Jury.

"Mr. Heller: Exception" (R. 1627-1628).

The Government claims that counsel for the defendants, in excepting to so much of the trial court's charge "as does not adequately explain to the jury what is meant by affecting interstate commerce" (R. 1541), did not thereby specifically tell the trial court in what respects the charge

was erroneous or deficient. It may be conceded that a general exception furnishes no basis for reversal by an appellate court. But, as this Court has pointed out in *McDermott* v. *Severe*, 202 U. S. 600, 610, the purpose of the requirement that an exception be specific is to call the trial court's attention to objections "in order that if necessary, it could correct or modify them." Clearly, the exception taken here was sufficient to call attention to the error asserted so that the trial court could have corrected or modified its instructions. The exception is, therefore, not subject to attack on the ground that it was not specific.

D. The trial court further erred in failing adequately to explain to the jury the meaning of the words "commerce" and "affecting interstate commerce" (R. 1541-1543).

An examination of the trial court's charge shows conclusively that it was left to the jury to decide whether the acts of the defendants affected interstate commerce, without adequate instructions as to the degree of affectation necessary. Never once in the charge was it said that there must be a substantial and direct effect upon interstate commerce, or anything of that nature. This is clearly reversible error.

The Government intimates that the trial court made some attempt to charge that there must be a substantial and direct effect upon interstate commerce. The reference is to R. 532 where the trial court charged "the violations must have been substantial and not merely incidental." The context of the charge at this point very clearly shows that the court was talking about the gravity of the violations *per se* and had no reference to their effect upon interstate commerce.

E. The trial court erred in failing to make intelligible to the jury the meaning of "overt act" and "vitalizing the conspiracy."

F. The trial court erred in refusing to admit evidence offered to prove the unreasonableness and impracticability of the provision requiring "straight killing".

G. The verdict of the Jury was not unanimous and was only made so by coercion exercised by the trial court upon a jury tired from 25 hours of deliberation.

The following[1] is the colloquy between the court and jurors when the jury was polled (R. 1551-1553).

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[1]"The Clerk: James Roxby.

"Mr. Roxby: As given, with one proviso, that on that Count 1, the principal count, we find him guilty on one Section of that item.

"The Court: No; you find him guilty on the count.

"Mr. Roxby: The last one, I think it is Section i, that has not been read, and I would like to put it in; otherwise the list as read is complete.

"The Court: You said you agreed on a verdict. If you have not agreed, why, I want to know it. You said you agreed upon a verdict. The verdict on the first count was announced as guilty. Is it or is it not? Have you or have you not agreed?

"The Foreman: We have agreed guilty on Count 1.

"Mr. Roxby: Well,——

"The Clerk: Mr. Roxby, how do you agree as to the verdict on the first count, guilty or not guilty?

"Mr. Roxby: Guilty under those conditions that I have stated.

"The Court: Now, guilty or not guilty? You came in and said you had agreed upon a verdict. Have you agreed or haven't you?

"Mr. Roxby: We have agreed.

"The Court: Then what do you find, guilty or not guilty, on that count?

"Mr. Roxby: Guilty; otherwise as read.

"The Court: Is that your verdict? Your verdict is guilty on the first count?

"Mr. Roxby: That is my verdict.

"Mr. Baumgarten: If he is guilty on this charge (i), does that consider the entire——

"The Court: The Count is presented. You said you agreed on a verdict. Now, if you have not agreed on it, and if you have agreed on the others, we will send you back on that.

Counsel for the defendants requested the court to give the jury further instructions (R. 4631). The court refused to do so. This was error. *Spurr* v. *United States*, 174 U. S. 728.

CONCLUSION

The defendants submit that the judgment of the Circuit Court of Appeals in No. 854 should be reversed and that in No. 864 affirmed.

Respectfully submitted,

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Counsel for Petitioners in No. 854 and Respondents in No. 864.

"Mr. Heller: I think the Jury did not understand Count 1. They may require further instructions.

"The Court: They did not ask for it and you are not in a position to ask for it. Have you agreed on that or have you not?

"Mr. Roxby: Yes, sir.

"The Clerk: Samuel Blank.

"Mr. Blank: As given.

"The Clerk: Joseph Sommers.

"Mr. Sommers: As given.

"The Clerk: Noel Andrews.

"Mr. Andrews: As given.

"The Court: Now there is no doubt about it, you have agreed on a verdict of guilty on the first count, that is right, is it?

(Several jurors answered "yes".)

"The Court: No doubt about that? That is the verdict?

"The Foreman: That is the verdict.

"The Court: You gentlemen in the back, that is your verdict, guilty, that is, the seventh and the ninth? That is correct is it?

"Mr. Roxby: Correct.

"Mr. Baumgarten: Yes, sir.

"The Court: Then there is no question."